THE JOURNAL OF LIBERTARIAN STUDIES

AN INTERDISCIPLINARY QUARTERLY REVIEW

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FREE EXCHANGE AND ETHICAL DECISIONS

Sorin Cucerai*

AUTARCHIC EXCHANGE VS. FREE EXCHANGE

The economic theory of interpersonal free exchange is beautifully simple. Given two individuals A and B, all we need for an exchange between them to take place is a double inequality. For example, suppose that A has an orange, and B has an apple. If A prefers B's apple more than his own orange, while B prefers A's orange more than his own apple, they will exchange.

This is simple, but it could also be misleading. Contemplating the theory, we might come to the conclusion that the double inequality is a *sufficient* condition for the interpersonal free exchange: whenever we have the double inequality, we also have the exchange. Or, to translate this in terms of demonstrated preference, whenever an exchange took place between two individuals, this happened because—and only because—a double inequality occurred.[1]

However, this conclusion doesn't hold. Suppose that we have the double inequality, but A doesn't consider B a human being. From A's point of view, B is nothing but an unusual apple tree. Consequently, he will try to appropriate B's apple in the same manner we usually pick apples from apple trees. However, unlike normal apple trees, B will fight for his apple.

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[1]On the theory of free exchange, see, e.g., Murray N. Rothbard, *Man, Economy, and State* (Auburn, Ala.: Ludwig von Mises Institute, 1993).

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A has two possibilities: pick an apple from an apple tree, or pick an apple from B. In both situations, A will engage in what economists call autarchic exchange. Apple picking is not costless, since one must give up something, such as physical energy and time, in order to pick an apple. If, on A's personal value scale, the goods he must give up in order to pick the apple are less valuable than the apple he desires, he will pick the apple.

Therefore, A faces a calculation problem. Which is the most cost-effective way to have an apple: grab it from B, or pick it from a normal apple tree? The answer to this question depends upon many factors: how far is A from an unowned apple tree, how far is B from A, the intrinsic qualities of the different apples, A's physical strength, B's physical strength, A's ability to cheat B (in order to avoid a physical confrontation with B), B's ability to recognize A's cheating maneuvers, and so on.

In autarchic exchange, we deal with only one value scale: the one of the agent. Other value scales either don't exist or are irrelevant. In interpersonal free exchange, on the contrary, because we have two agents, we not only have two different value scales, we also have a mutual recognition of the other person. In a free interpersonal exchange, both parties recognize themselves and the other party as agents.

In autarchic exchange, the problem of cost calculation looks like this: what must I give up in order to obtain something? In interpersonal exchange, the same problem looks like this: what must I give up in order to obtain something *from someone else*?

Therefore, the double inequality *is* not and *can*not be a sufficient condition for the interpersonal free exchange to take place. For such an exchange to take place, we also have to meet another condition: the mutual recognition of both parties as fellow humans (or, in more general terms, as agents). In other words, the double inequality is but a *necessary* condition of interpersonal free exchange.

Recognizing the other as a fellow human, recognizing him or her as an agent, is an ethical decision—in fact, the most fundamental ethical decision. We engage in non-aggressive activities if and only if we decide that we deal with another agent. Whenever we don't make such a decision, we engage only in autarchic exchange.

One consequence of this argument is that autarchic exchange is the simplest explanation of aggression. If A treats B as an unusual apple tree, he will engage in predatory activities against B. This happens

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because, in autarchic exchange, the other is but a resource, while in a free interpersonal exchange, the other is *the owner* of the desired resource. Theft, rape, murder, enslavement, and so on prove that the victims' value scales were ignored by the agents who engaged in aggressive actions against them.

Since a free interpersonal exchange presupposes not only a double inequality but also a mutual recognition of both parties as agents, the free market is an ethical environment. The expansion of the market means that more and more individuals are recognized as fellow humans, as agents with personal value scales. In other words, a free market is conducive to ethical behavior.

Conversely, criminal anarchy is possible only within non-market environments. The more restricted the market is, the more generalized autarchic exchanges become. Thomas Hobbes described a world where everyone is at war with everyone, and where life is short, brutish, and ugly.[2] It is important for us to understand that such a situation is possible only within a non-market environment. In other words, "the law of the jungle" doesn't describe how individuals behave on a market, but how they behave *when there is no market.*

Within a non-market environment, an individual engages only in autarchic exchanges, like Robinson Crusoe on his desert island. From his point of view, the world comprises only unowned resources, and all the other individuals are treated as potentially dangerous resources—as tigers somehow carrying apples on their backs, for instance. When an individual doesn't recognize the humanness of the other, the only possible way of conduct left is aggression: the initiation or threat of physical force as a means to achieve goals.

This simply blows into pieces the myth of the good dictator or, in the case of welfare states, the myth of the good administrator (or the good politician or technocrat). Both the dictator and the administrator create and support a non-market environment. In other words, they live by making non-market decisions. In so doing, they engage themselves in autarchic exchanges: they fail to recognize the humanness of other people.

A non-market environment requires individuals who are able to create and support non-market patterns of redistribution. In order to

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[2]Thomas Hobbes, *Leviathan*, ed. J.C.A. Gaskin (Oxford: Oxford University Press, 1996).

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become such an individual, one has to have certain moral traits, the first of which is the ability to treat other human beings as resources, not as resource owners. The more such traits one has, the more chances there are to successfully rule the non-market environment. We live in a world full of kings, presidents, and prime ministers. Irrespective of their political creeds and the number of their supporters, in order to become a king, president, or prime minister, one has to have a large number of those moral traits that we usually despise, but that are necessary prerequisites of success within a non-market environment. In other words, "honest statesman," "honest politician," "honest technocrat," and the like are but contradictions in terms.[3]

A free market can survive only when embedded within a tradition of individual human dignity. More precisely, a free market generates such a tradition—because free exchanges are possible when we have a double inequality, *and, at the same time, when both parties recognize the humanness of the other*—and is supported only by such a tradition.

ETHICS AND EXCHANGE

Recognizing the other as a fellow human—as an agent with his or her own personal preference scale—is the most fundamental ethical decision, but such a decision is taken for granted, and therefore left unexplained, by all the ethical theories we know. To better understand this problem, let's focus on three major ethical approaches: Lockean, Kantian, and utilitarian. At first glance, one could say that being Lockean or Kantian is inconsistent with being a tyrant. In the case of utilitarianism, things are more complicated, but let's assume we can develop a version of utilitarianism that is inconsistent with tyranny. Yet, such an incompatibility is true if and only if all humans are treated as humans by the Lockean or Kantian individual.

An ethical theory tries to prove that all humans should be treated in a certain manner. If you are Lockean, for instance, you should respect your fellow humans' natural rights, but a question remains unanswered: *who counts as human*? When we say "all humans," we do not specify what a human is. Aristotle, for example, thought that slaves were household animals—different from horses, cows, or hens, but

[3]This is an extension of Hayek's argument on "why the worst get on top." See F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944).

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still animals. In recorded human history, various groups of human beings thought that other groups were sub-human. Therefore, they felt entitled to use them as unowned resources, or even to slaughter them.[4] From this point of view, one can consistently be both a slave owner and, let's say, a Lockean.

To understand why a human decides to recognize another as a fellow human, we must ignore the ethical theories. As we saw, they cannot help us in this research, since they take such a decision for granted, so we must start from somewhere else. For instance, I co-ordinate a private seminar on the political philosophy of freedom. Since this is a private seminar, nobody is compelled to participate. On the other hand, nobody expects academic reward or recognition from participating in the seminar sessions. So why do people come to my seminar? Presumably because they are interested in what I have to say. In other words, my arguments are a useful resource for them. But if they want access to such a resource, they must treat me as a free man—as a resource owner, not only as a resource, because this is the only way they are sure they get the resource they want (i.e., *my* arguments) and not some phony arguments I might develop in order to stay alive.

Let me give you another example. Nicolae Ceausescu, the former communist dictator of Romania, was allegedly interested in logical issues, so he had long conversations with Athanase Joja, a fine logician and a member of the Romanian Academy. If Ceausescu wanted only to learn some principles of logic—let's say, deductive logic—all he had to do was to take a textbook on deductive logic, or to force some logician to teach him deductive logic. As a dictator, he had access to such means. However, if Ceausescu was genuinely interested in logical issues and the creative dimension of logic, he had no other way but to treat Joja as a free man. His dictatorial powers were useless in this respect.

In other words, we can have access to some resources that are valuable to us if and only if we treat other people as fellow humans, that is, as agents endowed with their own personal value scales. This happens because such resources can be produced only by free individuals, and they cease to exist whenever we treat others as resources, not as resource owners. Among such resources we usually include love, friendship, and affection.

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[4]Examples are too numerous and well known to mention.

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REASON, LANGUAGE, AND THE MARKET[5]

There are at least two other resources of this kind that are of tremendous importance for human beings: reason and language. Through reason, I understand the computational ability necessary to coordinate one's performance within the outside world. This means both the ability to receive and process valuable information from the outside world, and the ability to find or create better environmental niches. Language is the ability to turn some of these processes into words and sentences.[6]

Taking other people into account requires more calculation. Not only we will have to deal with another human's existence, we will also have to deal with his or her own preference scale. This offers us new relevant information, but it also requires a better computational system: a bigger brain than apes possess, for instance, and a larger neural network.

This may look like circular reasoning: one would seemingly need reason and language in order to appreciate these human features as valuable resources. But the truth is that *reason and language are emergent tools*, not goals purposively attained. In other words, reason and language are evolutionary abilities we learned to use, not goods we obtained on purpose. To simplify, the process looks like this:

- individuals did certain things to achieve certain goals;
- in so doing, they acquired certain traits as a side effect of their behavior;
- these traits were selected and reproduced, because they offered the individuals better ways to perform in the outside world.

This doesn't mean they were purposively selected. Rather, they offered the individuals' genes better reproductive chances, so individuals with such traits eventually outnumbered the individuals without them. Reason and language are such traits.

There are resources we cannot reach, such as affection, unless we treat other humans as free individuals. Suppose one man accidentally discovered that in order to obtain affection from another human, he

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[5]This section of my paper generalizes the argument on the impossibility of economic calculation in socialism. See Ludwig von Mises, *Socialism* (Indianapolis, Ind.: Liberty Classics, 1982).

[6]On the computational theory of the mind, see, for instance, Steven Pinker, *How the Mind Works* (New York: W.W. Norton, 1997).

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must treat this other human as a free individual. In so doing, he had to deal not only with the other human's existence as a resource (or as a danger) but also with his or her scale of preferences. He thus discovered a more complex level of computation, and he began to operate at this level. In other words, he acquired reason in the human sense of the term. Since his computational abilities expanded, his chances to reproduce his genes expanded also. Therefore, people who acquired a certain degree of human reason eventually outnumbered other people.

Taking into account a different scale of preferences requires a more complex system of communication, of exchanging information. Thus, human language occurs. With reason and language, it becomes possible for two human individuals to separate their goals, and to trade means in order for each of them to achieve his or her own goal. To put it differently, with reason and language, free exchange becomes possible and a market environment becomes available as a new environmental niche. This further expands the separation of goals, allowing more and more goals to be followed, which, in turn, expands human reason and language.

This offers grounds for a refutation of Thomas Hobbes. More precisely, we are now able to reject his claim that individuals living within a non-market environment (i.e., living within a criminal anarchic environment like the one he imagined) are still endowed with human reason and language. His claim is based upon the false belief that reason and language are somehow miraculously attached to human individuals under any circumstances. However, we saw that criminal anarchy is the best description of a non-market environment. We also saw that reason and language are conducive to free exchange. Therefore, if we have no market, we lose reason and language. The more hampered a market is, the less reason individuals on that market have, and the less complex their linguistic abilities become. In other words, an individual placed within a Hobbesian environment would soon lack the reason and language necessary to understand and to describe the fact that he or she is placed within a Hobbesian environment. This is true, of course, if and only if the Hobbesian environment is universal in time and space. In other words, if nothing but hell existed, the mighty Prince of Darkness would soon turn into a zombie, into a pathetic creature unable to understand and to operate with concepts like control, manipulation, or Kingdom of Evil.

Totalitarian societies are good examples of criminal anarchies where individuals are treated as resources, and where the fittest operator with

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such resources becomes the leader. Yet, we know that the first things that disappear in such societies are reason and language. Individual computational abilities are severely diminished by forcing the computational system to operate with false information, and by not allowing it to have access to other scales of preferences. Sometimes the computational system is completely dismantled—through means of Hegelian or Marxist "dialectics," for instance. Likewise, language quickly decays into Newspeak.[7]

The existing totalitarian societies were not completely Hobbesian, however, because they were not universal in time and space. They had free neighbors and free ancestors. The elite of a totalitarian regime had access to the neighboring market environment. The oppressed, on the other hand, had direct or indirect access to the memory of a free world. This allowed for the survival to some extent of reason and language, giving the false impression that the totalitarian system is able to operate solely on its own basis. In fact, the system was heavily supported by the existence of a wide market environment, able to generate and refine reason and language.

Therefore, the very fact that Hobbes wrote a book like *Leviathan* proves that neither Hobbes nor many generations of English-speaking (and writing) humans before him lived within a Hobbesian environment. Otherwise, the computational and linguistic abilities necessary to write such a book would have been beyond human reach.

The argument I developed here holds not only for groups but also for individuals. Let's consider cheating, for instance. In order to cheat another human individual, one has to deal with this other individual's scale of preferences, so the cheater must have acquired human reason. But his computational abilities could not have developed from cheating. On the contrary, his computational abilities developed because of interpersonal free exchange—because of the market environment he inhabits. To outsmart his victim, the cheater must be able to operate at the complex computational level developed within a market environment. He must keep his computational system clean and safe, and, at the same time, he must be able to "poison" his victim's system with false information. But in so doing, the cheater relies heavily upon the market environment. Deprived from this environment, he would soon become unable to do such complex computations.

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[7]For a description of such processes, see Hayek, *Road to Serfdom*; see also Françoise Thom, *La Langue de Bois* (Paris: Julliard, 1987).

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Conclusion

In general terms, once a market environment becomes available, human aggressors must rely on it in order to outsmart their victims. They are not intelligent themselves; they simply "borrow" reason and language from the market. On the other hand, combining reason and language with autarchic exchanges is a more expensive way to get and to keep what you want than is free exchange. Market predators pay too much for the goods they want. Traits like honesty and good faith develop because, within a market environment, they help individuals with such traits to pay less for the goods they desire than the individuals without them.

This is why market predation is not and cannot be a universal behavior. It is also why institutionalized aggression—in the form of governments, for instance—is too costly, and therefore less stable, than markets. Political history offers enough proofs.

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A LIBERTARIAN THEORY OF CONTRACT: TITLE TRANSFER, BINDING PROMISES, AND INALIENABILITY

N. Stephan Kinsella*

INTRODUCTION

Property and Contract

The theory of property specifies how to determine which individuals own—have the right to control—particular scarce resources. By having a just, objective rule for allocating control of scarce resources to particular owners, resource use conflicts may be reduced. Non-owners can simply refrain from invading the borders of the property—that is, avoid using the property without the owner's consent.

Under the libertarian approach, the first to use an *unowned* scarce resource—the homesteader—becomes its owner.[1] The first possessor has better title in the property than any possible challenger, who is always a latecomer.[2] But property rights are not only acquired, they

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[1]See John Locke, *Two Treatises on Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1970), esp. book 2, chap. 5. An excellent background to the material covered here, see Murray N. Rothbard, "Property Rights and the Theory of Contracts," in *The Ethics of Liberty* (New York: New York University Press, 1998), pp. 133–48; and Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies* 1 (Winter 1977), pp. 3–13.

[2]The owner of a given resource is said to have a title to the property, i.e., is entitled to use it. On the function of property rights, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer, 1989), chaps. 1, 2,

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may also be lost or transferred to others. For example, the owner may abandon the property so that it once more becomes unowned and available for appropriation by a new homesteader. Likewise, the owner may give or sell the property to another. The owner might also commit a crime or tort, thereby forfeiting his rights to the property, in favor of the victim.

Property theory concerns not only the initial acquisition of property rights but also their loss and transfer. Tort and punishment theory, as subsets of general property theory, describe how acts of aggression or negligence change rights to scarce resources.[3] Contract theory specifies how rights are transferred as the result of voluntary agreement between the owner and others. While some voluntary agreements are enforceable, others are not. The question for libertarians concerns when and why agreements are legally enforceable. In other words, how are rights voluntarily transferred?

Overview of Contract

The institution of contract is widespread. Contracts are used in a variety of situations, from simple barter to complex exchanges such as loans and employment contracts. A contract is a relation between two or more parties which includes legally enforceable obligations between them. Contracts result from agreement between parties to exchange promises or performance, e.g., one party promises to do (or not do) something, or to give (or not give) some thing to the other party.

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and 7, esp. pp. 5–6 and 8–18, discussing notions of scarcity, aggression, norms, property, and justification. See also the discussion of Hoppe's work on this topic in N. Stephan Kinsella, "Defending Argumentation Ethics: Reply to Murphy & Callahan," *Anti-state.com* (Sept. 19, 2002).

[3]Invasions of the borders—uninvited use—of others' property by a tortfeasor or aggressor results in a transfer of rights from the wrongdoer to the victim. By attacking someone, the aggressor transfers some rights in his body and/or property to the victim, for purposes of punishment and/or restitution. See N. Stephan Kinsella, "Inalienability and Punishment: A Reply to George Smith," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–99), pp. 79–93; Kinsella "Defending Argumentation Ethics"; and N. Stephan Kinsella, "A Libertarian Theory of Punishment and Rights," *Loyola of Los Angeles Law Review* 30 (1997), pp. 607–45. In causing damage to another's property through negligence (the commission of a tort), the tortfeasor becomes liable to the victim. In both cases, the wrongdoer loses rights, not because of any voluntary agreement, but by virtue of his action.

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The promise may be made in exchange for things given or promised by the second party. Not all agreements are binding, but those meeting certain criteria are.[4] If the promises result in a contract, the force of law can be brought to bear to enforce the contract. In modern legal systems, when one party breaches the contract (fails to render the agreed-upon performance), the other party may sue to have appropriate "remedies" awarded. The remedies can include rescission (cancellation of the contract) and money damages.

Contractual obligations may be classified as obligations *to do* or *to give*.[5] An obligation to give may be viewed as a transfer of title to property, as it is an obligation to give ownership of the thing to another. An obligation to do is an obligation to perform a specific action, such as an obligation to sing at a wedding or paint someone's house. It is significant for our purposes that courts usually will *not* order *specific performance* (forcing the breaching or unwilling party to perform the contract), on the grounds that the plaintiff can usually be adequately compensated with money damages.[6] Further, money damages do not impose a heavy burden on the court to supervise performance, while specific performance would. Specific performance would often be counterproductive. Consider a singer who refuses to perform a promised contract, for example. If ordered to perform, the signer might well give a shabby performance. Therefore, in such cases, the singer would be ordered to pay monetary damages to the other party.

Even an agreement to sell a piece of property, such as a barrel of apples or a car, will usually not be enforced with specific performance;

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[4]"Agreement" is a broader term than "contract," because not all agreements are enforceable, and a given agreement might lack an essential element of a contract. For useful definitions of various legal terms used in this article, see *Dictionary.law.com*; see also Bryan A. Garner, ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West, 1999).

[5]See *Louisiana Civil Code*, arts. 1756 and 1986, describing obligations to do an act and obligations to give. See also Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review* 86 (1986), pp. 269–321, at p. 189, discussing obligations to do and to give; Saúl Litvinoff, *Obligations* (St. Paul, Minn.: West, 1969), vol. 1; and Saúl Litvinoff, *The Law of Obligations* (St. Paul, Minn.: West, 1992), for a masterful discussion of the law and nature of obligations.

[6]Barnett, "A Consent Theory of Contract," p. 181. On the availability of specific performance in civil-law systems, see *La. Civ. Code*, art. 1986; and Litvinoff, *Obligations*, vol. 2, pp. 301–2.

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instead, the court would order the promisor to pay the promisee a sum of money. Specific performance is typically granted only in the case of unique property, such as a particular portrait, or in the case of real estate, because each parcel of land is unique. Even in these cases, specific performance results in the transfer of title to the unique property from the owner to the other party.

Thus, in modern law, breach of contract results in a transfer of property—sometimes unique goods such as real property, but usually money—from the breaching party to the promisee. Thus, contracts are enforced today *not* by forcing a party to perform the promised action but by threatening to transfer some of the promisor's property to the promisee *if* the promisor does not perform. For an agreement to be enforceable under modern legal systems *means that* some of one party's property (whether money or some other owned good) can be forcibly transferred to the other party.

Thus, in modern contract law, there are really no contractual obligations "to do" anything. There are only obligations to transfer title to property, either directly (agreement to pay a sum of money) or as a consequence of failure to perform a promised action (obligation to pay a sum of money if the promised performance does not occur). It should be noted that, despite the lack of a legal compulsion to perform a contract, the institution of contract is alive and well. The legal threat of transfer of some of the promisor's property in the event of default, combined with reputation effects, is apparently sufficient to render contracting useful.

At a minimum, contract theory purports to justify the transfer of title to the property of parties to a contract. And in the case of specific performance, debtors' prison, and voluntary slavery, contract theory must justify the use of force against the parties. Not surprisingly, then, a variety of arguments have been set forth attempting to explain why agreements may be enforced.[7]

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[7]Barnett, "A Consent Theory of Contract," provides a useful discussion of the multitude of contract theories which have been proposed. For a recent work discussing contract theory, see Harry N. Scheiber, ed., *The State and Freedom of Contract* (Stanford, Calif.: Stanford University Press, 1999). See also Richard Craswell, "Contract Law: General Theories," section 4000 in *Encyclopedia of Law & Economics* (Cambridge: Cambridge University Press, 2000); Morris R. Cohen, "The Basis of Contract," *Harvard Law Review* 46 (1933), p. 573; Charles Fried, *Contract as Promise* (Cambridge,

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Speech, Promises, and Libertarianism

The question especially interests libertarians. By endorsing a given theory of contract, we are, in effect, supporting the transfer of property rights from the owner to others, in certain circumstances.

Why does making a promise or agreeing or "committing" to do something result in a transfer of rights from the promisor to the promisee? To many—even to many libertarians—it seems elementary and obvious: if you promise to do something, you may be forced to do it. Some libertarians and laymen assume that an individual has some power or ability to legally "bind" or obligate himself by simply promising to do something. However, this assumption is groundless. Not all promises are enforceable, nor should they be.

As a general matter, libertarians hold that the use of force is permissible only in *response* to *initiated* force. Viewed in property terms, property may be used only with the consent of its owner. Unprovoked aggression against another is a use of his property (or his body) without his consent, and is therefore prohibited. As a result of the act of aggression, the victim becomes entitled to use the aggressor's property (or body) for, e.g., purposes of punishment. That is, by committing aggression—using a victim's property without consent—some or all of the aggressor's property rights are transferred to the victim. Because the aggressor used the victim's property as if it were his own (although it is not), the victim may use the aggressor's property as if it is his own.[8] This is why initiated force (aggression) is impermissible, while responsive force—force in response to aggression—is not.

It is impermissible to use force in response to *non*-invasive actions, since this would itself be initiated force. Speech is (generally) nonaggressive, for example, because it does not invade others' property borders, so it does not justify the use of responsive force.[9] Libertarians

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Mass.: Harvard University Press, 1982); and Charles J. Goetz and Robert E. Scott, "Enforcing Promises: An Examination of the Basis of Contract," *Yale Law Journal* 89 (1980), p. 1261.

[8]See Kinsella, "Defending Argumentation Ethics"; Kinsella, "A Libertarian Theory of Punishment and Rights"; Kinsella, "Inalienability and Punishment"; and N. Stephan Kinsella, "New Rationalist Directions in Libertarian Rights Theory," *Journal of Libertarian Studies* 12, no. 2 (Fall 1996), pp. 313–26.

[9]I say "generally" because speech acts can be one means by which a person causes aggression. For example, a crime lord ordering an underling to murder someone is complicit in murder, as is the captain of a firing squad murdering

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oppose censorship and recognize a free-speech right because speech, *per se*, does not aggress. The recipient of noxious or unwanted speech is free to ignore it and go about his business. The boundaries of his body and property are not invaded by speech, and his actions are not physically restrained by the mere words of others. The same holds true of promises, at least at first glance. As even mainstream contract theorists have long pointed out, a "mere promise" is not sufficient to create a binding contractual obligation.[10]

For example, consider a budding singer who asks his famous actor friend to attend the singer's concert. The actor says, "I'll be there." The singer is pleased, hoping that the actor's fame will add publicity to the event. To the singer's disappointment, though, the actor fails to show up. Did the actor violate any of the singer's rights? Of course not. What if the actor had said, "I promise to attend your concert"? The actor told, or promised, the singer that he would go to the concert, but he did not by these speech-acts aggress against the singer or his property.

A promise, then, would seem to be unenforceable unless it somehow gives rise to or involves an act of aggression, that is, it somehow causes an uninvited use—invasion of the borders—of another's property. But a promise seems to be merely a speech-act; it does not appear to aggress against anyone.

If promises are not aggression, then the only other way that promises could be enforceable is if the promise resulted in a transfer of property rights from the promisor to the promisee. Then the promisee could "enforce" the contract by simply using the (former) property of the promisor, title to which has transferred to the promisee. However, to state that promises transfer property titles begs the question that contract theory asks: Why does a promise serve to transfer title?

Consideration

Many theories have been set forth in an attempt to explain or justify why the law enforces contracts, and why it makes some promises "binding" or enforceable. It is only a special type of promise, or a

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an innocent man, when he states, "Ready, aim, fire!" In general, however, speech does not cause invasion of others' property. I will address these issues in further detail in a forthcoming article on causation and the law.

[10]See, e.g., Shael Herman, "Detrimental Reliance in Louisiana Law—Past, Present, and Future (?): The Code Drafter's Perspective," *Tulane Law Review* 58 (1984), pp. 707–57, at 711.

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promise plus *something else*, that results in a legally binding contract under today's legal systems.

Under the common law doctrine of bargained-for consideration, the (enforceable) contract requires a promise and *consideration*—something of value received in exchange for the promise.[11] This is why a dollar is often given (or stated to be given) by one party who is receiving something from another party. The consideration may be another promise or something else of value. For example, in a bilateral contract, the parties obligate themselves reciprocally so that each one's promised obligation serves as the consideration for the other's promise.[12] The value of the consideration given need not match the value of the thing received. In fact, even consideration as small as a "peppercorn" will suffice.[13]

Yet, the antiquated doctrine of consideration has long been criticized.[14] It would prevent a contract from being formed in some situations that it seems they should, such as gratuitous (gift) promises, and even some commercial promises.[15] Further, if a mere promise (naked

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[11]Saúl Litvinoff, "Still Another Look at Cause," *Louisiana Law Review* 48 (1987), pp. 3–28, at 18–19; *Restatement of the Law Second, Contracts 2d* (St. Paul, Minn.: American Law Institute Publishers, 1981), § 71; Barnett "A Consent Theory of Contract," pp. 287–91.

[12]See *La. Civ. Code*, arts. 1908–1909, describing unilateral and bilateral obligations. In civil law systems, "consideration" is not required, but there must be a lawful "cause" which is "the reason why" a party obligates himself. See *La. Civ. Code*, arts. 1966 and 1967; Litvinoff, "Still Another Look at Cause"; Herman, "Detrimental Reliance in Louisiana Law," p. 718; Malcolm S. Mason, "The Utility of Consideration—A Comparative View," *Columbia Law Review* 41 (1941), pp. 825–48; Jon C. Adcock, Note, "Detrimental Reliance," in "Obligations Symposium," *Louisiana Law Review* 45 (1985), pp. 753–70. For a discussion of further differences between common law and civil law legal systems, see N. Stephan Kinsella, "Legislation and the Discovery of Law in a Free Society," *Journal of Libertarian Studies* 11 (Summer 1995), p. 132; and N. Stephan Kinsella, "A Civil Law to Common Law Dictionary," *Louisiana Law Review* 54 (1994), pp. 1265–305.

[13]*King County v. Taxpayers of King County*, 133 Wash. 2d 584; 949 P.2d 1260 (Wa.S.Ct. 1997), at n.3.

[14]See Barnett, "A Consent Theory of Contract," pp. 287–91, for discussion and criticism of the bargain theory of consideration. See also Mason, "The Utility of Consideration."

[15]See Mason, "The Utility of Consideration," pp. 832–42.

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promise, or *nudum pactum*) is not enforceable, why does it become enforceable just because the promisee gives something small in return? Given that only token consideration—a peppercorn—is sufficient to make a promise enforceable, doesn't the doctrine of consideration elevate form over substance? Why can we not dispense with the formality and make mere promises, or at least promises with some kind of sufficient formality, enforceable? Further, under Austrian value theory, how can we say the thing given in return "has value" to the recipient?[16] Maybe he accepts it only as a formality to satisfy the courts.

From the libertarian point of view, receiving consideration for a promise does not convert the promise into an act of aggression, nor is it clear how it causes the promise to effectuate a transfer of title any better than a naked promise would.

Promissory Estoppel and Detrimental Reliance

The requirement of consideration can sometimes lead to seemingly harsh results, because some promises will be unenforceable if there is no consideration, but they will be relied upon by the promisee. A classic example is the grandfather who promises his granddaughter he will pay her tuition if she goes to college. However, in exchange, she gives nothing of legally recognized value, so there is no consideration and, thus, no binding contract. Halfway through her college career, the old man may change his mind and stop paying. What is the granddaughter to do? Can she sue to enforce the promise to pay for her tuition? Under the standard theory of contract, she cannot prevail, because consideration is missing.

The equitable doctrine of promissory estoppel is used in common law systems to form an alternative basis for enforcement of contracts.[17]

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[16]See Ludwig von Mises, *Human Action: A Treatise on Economics*, 4th ed. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1996), pp. 94–96, and 102–3; Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," in *Method, Money, and the Austrian School*, vol. 1 of *The Logic of Action* (Cheltenham, U.K.: Edward Elgar, 1997), pp. 211–54.

[17]Barnett, "A Consent Theory of Contract," p. 276 n. 25, discusses the role of detrimental reliance in enforcing promises that would otherwise be unenforceable for lack of consideration. Herman, "Detrimental Reliance in Louisiana Law," p. 713 n. 19, discusses the use of promissory estoppel in common law jurisdictions as a substitute for consideration. See also Litvinoff, "Still Another Look at Cause," p. 19. Thomas P. Egan, "Equitable Doctrines Operating

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The doctrine seeks to protect the "expectations" or "reliance interest" of the promisee.[18] The *Restatement (Second) of Contracts*, for example, provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[19]

Similarly, the Louisiana Civil Code provides:

> A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise.[20]

If there is "detrimental reliance," then promissory estoppel can be invoked to enforce the promise. Even though there is technically not a valid contract, because, for example, the promisee gave no consideration, the promisor is "estopped" to deny this because this would work

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Against the Express Provisions of a Written Contract (or When Black and White Equals Gray)," *DePaul Business Law Journal* 5 (1993), pp. 261–312, at pp. 263–69 and 305–10, discusses the historical and philosophical basis of contract law and the development of the doctrine of promissory estoppel. For additional discussion of promissory estoppel and detrimental reliance, see Randy E. Barnett and Mary E. Becker, "Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations," *Hofstra Law Review* 15 (1987), pp. 443–97; Adcock, "Detrimental Reliance"; and Christian Larroumet, "Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law," *Tulane Law Review* 60 (1986), p. 1209.

[18]See Evers, "Toward a Reformulation of the Law of Contracts"; and Rothbard, "Property Rights and the Theory of Contracts," p. 133.

[19]*Restatement (Second) of Contracts* § 90(1) (1979). Civil law systems provide similar grounds for enforcement of promises. The idea of detrimental reliance can be found in Roman law and in the Latin maxim *venire contra proprium factum* (no one can contradict his own act). Herman, "Detrimental Reliance in Louisiana Law," p. 714.

[20]*La. Civ. Code*, art. 1967. See also Litvinoff, "Still Another Look at Cause," pp. 18–28.

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a hardship on the promisee.[21] In the case of the granddaughter, she can prevail in court under this theory. In this way, detrimental reliance is used as an alternative ground for contract enforcement. The idea of protecting the expectations or reliance interests of promisees is also sometimes seen as the primary justification for enforcing contracts.

The theory of detrimental reliance rests on the notion that a promise sets up an "expectation" of performance in the mind of the promisee which induces him to act because he reasonably relies on this expectation. Of course, every time someone acts, he is "relying" on some understanding of reality. This reliance might be quite ridiculous or unreasonable. Thus, all detrimental reliance theories and doctrines inevitably qualify the theory by saying that a promise is enforceable only if the promisee *reasonably* or *justifiably* relied on the promise.[22] If the reliance is not reasonable, it is not the promisor's "fault" that the promisee relied; the promisor could not have anticipated outlandish reliance.

One problem with this theory, however, is its circularity. In deciding whether to rely on a given promise, a reasonable person would take into account whether promises are enforceable. If promises without consideration are known to be unenforceable, for example, it would be unreasonable to rely on it because it is known that the promisor is not obligated to keep his promise! Thus, reliance depends on enforceability. Yet, the detrimental reliance doctrine makes enforceability itself depend on reliance, hence the circularity.[23] As such, conventional theories of contract enforcement are defective.

For the libertarian, another problem with detrimental reliance is that it is not explained why a person's "reliance" on the statements or representations of another gives the relying person a *right* to rely on this. Why can a person be forced to perform or be liable for failure to perform a promise, just because it is "relied on" by another? The default assumption for the libertarian is that you rely on the statements of others at your own risk.

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[21]See Litvinoff, "Still Another Look at Cause," pp. 23–24. For further discussion of promissory estoppel, see Kinsella, "A Libertarian Theory of Punishment and Rights," pp. 612–13.

[22]Barnett, "A Consent Theory of Contract," p. 275.

[23]For various discussions of the circularity of reliance theories of promising, see F.H. Buckley, "Paradox Lost," *Minnesota Law Review* 72 (1988), pp. 775–827, at p. 804; Barnett, "A Consent Theory of Contract," pp. 274–75, 315–16; and Barnett and Becker, "Beyond Reliance," pp. 446–47, 452.

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As we see, then, the mainstream theories proposed to date that are purported to justify and explain the institution of contract have been, by and large, inconsistent and unsatisfying.

THE TITLE-TRANSFER THEORY OF CONTRACT

Evers-Rothbard Title-Transfer Theory

A much better grounding for contract law is found in the writings of libertarian theorists Murray Rothbard and Williamson Evers, who advocate a *title-transfer* theory of contract.[24] As Rothbard and Evers point out, a binding contract should be considered as one or more *transfers of title to (alienable) property*, usually title transfers exchanged for each other. A contract should have nothing to do with promises, which at most serve as *evidence* of a transfer of title. A contract is nothing more than a way to give something you own to another person.

Title may be conveyed without ever promising anything. I can, for example, manually give you a dollar in payment for a soda. No words need be exchanged. Or I can simply state my intention to give you something I own: "I hereby give you my car," or even "I hereby give you my car in three days." There need be no "promise" involved. In general, title is transferred by manifesting one's intent to transfer ownership or title to another.[25] A promise can be one way of doing this, but it is not necessary. Rothbard and Evers seem to have a fixation on the word "promise" and do not agree that a promise can convey

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[24]The theory discussed in this section is largely based on that developed by Rothbard, "Property Rights and the Theory of Contracts," and Evers, "Toward a Reformulation of the Law of Contracts," although I have made some additions and changes. Randy Barnett has also contributed a large number of important insights to the theory of contracts as well. See Barnett, "A Consent Theory of Contract"; Randy Barnett, "Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud," *Harvard Journal of Law & Public Policy* 15 (1992), pp. 783–803; and Randy Barnett, "The Sound of Silence: Default Rules and Contractual Consent," *Virginia Law Review* 78 (1992), pp. 821–911.

[25]Evers, "Toward a Reformulation of the Law of Contracts," p. 12 n. 20, endorses making "objectively observable conduct symbolizing consent the standard for determining whether consent has been given." See also Barnett, "A Consent Theory of Contract," p. 303: "Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its alloted boundary-defining function." And, on p. 305, emphasis in original: "The consent that is required [to transfer rights to alienable property] is a *manifestation of an intention to alienate rights.*"

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title. They appear to think that because a promise is not enforceable, it cannot serve to transfer title to property.[26] However, a promise can be intended and understood to convey title and, thus, can operate to do so. In certain contexts, the making of a promise can be one way to manifest one's intent to transfer title.

Ultimately, contracts are enforced simply by recognizing that the transferee, instead of the previous owner, is the current owner of the property. If the previous owner refuses to turn over the property transferred, he is committing an act of aggression (trespass, use of the property of another without permission) against which force may legitimately be used.

Conditional Transfers of Title

The simplest title transfers are contemporaneous and manual. For example, I hand a beanie baby to my niece as a gift. However, most transfers are not so simple, and are conditional. Any future-oriented title transfer in particular is necessarily conditional, as are exchanges of title. For example, before dinner, I tell my niece that she gets the beanie baby after dinner *if* she behaves during dinner. The transfer of title is future-oriented, and conditional upon certain events taking place. *If* my niece behaves, *then* she acquires title to the beanie baby. Future transfers of title are usually expressly conditioned upon the occurrence of some future event or condition.

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[26]Rothbard, "Property Rights and the Theory of Contracts," p. 141; and Evers, "Toward a Reformulation of the Law of Contracts," p. 6. But see also Murray N. Rothbard, *Man, Economy, and State* (Los Angeles: Nash Publishing, 1962) p. 153: "Contract must be considered as an agreed-upon exchange between two persons of two goods, present or future. . . . Failure to fulfill contracts must be considered as theft of the other's property. Thus, when a debtor purchases a good in exchange for a promise of future payment, the good cannot be considered his property until the agreed contract has been fulfilled and payment is made. . . . An important consideration here is that contract not be enforced because a promise has been made that is not kept. It is not the business of the enforcing agency or agencies in the free market to enforce promises merely because they are promises; its business is to enforce against theft of property, and contracts are enforced because of the implicit theft involved. Evidence of a promise to pay property is an enforceable claim, because the possessor of this claim is, in effect, the owner of the property involved, and failure to redeem the claim is equivalent to theft of the property." See also pp. 152–55; and Rothbard, "Property Rights and the Theory of Contracts," pp. 137–38.

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In addition, because the future is uncertain,[27] future-oriented title transfers are necessarily conditioned upon the item to be transferred *existing* at the designated time of transfer. Title to something that does not exist cannot be transferred. Consider the situation where I own no hamster but tell my niece, "Here, I give this hamster to you." In this case, "this hamster" has no referent so no title is transferred. Likewise, the future beanie baby transfer is conditional not only on the expressly stated condition—the niece performing the specified action (behaving) —but also on the unstated condition that the beanie baby *exists* at the designated future transfer time. During dinner, the cat might destroy it, or it might be lost, or consumed in fire. Even if the niece behaves, there is no beanie baby left for her to acquire. In effect, when agreeing to a future title transfer, the transfer is inescapably accompanied by a condition: "I transfer a thing to you at a certain time in the future—if, of course, the thing exists."

Like future title transfers, title exchanges are also necessarily conditional. This is true even of a simple, contemporaneous exchange. I hand you my dollar and you hand me your chocolate bar. Because it is an *exchange* rather than two unrelated transfers, the title transfers are conditional. I give my dollar to you only on the condition that you give your chocolate bar to me, and vice versa. Exchange contracts often involve at least one future title transfer which is given in exchange for either a contemporaneous or future title transfer by the other party. In this case, each title transfer is conditional upon the other title transfer being made. Also, any future title transfers are conditional upon the future existence of the thing to be transferred.

Many types of contracts can be formed by imposing various conditions on the title transfers involved. For example, suppose that we make the following wager: *If* the horse Starbucks finishes first, *then* I transfer to you $100; otherwise, the $10 you gave me remains mine to keep. In this case, you transferred title to $10 me at the moment of the wager, conditioned on my agreeing, at the moment of the wager, to a future, conditional transfer of $100 to you. I transferred title to $100 to you in the future, on two conditions: the explicit condition that Starbucks wins, and the implicit condition that I have title to $100 at the designated future payment time.

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[27]See Hans-Hermann Hoppe, "On Certainty and Uncertainty, Or: How Rational Can Our Expectations Be?" *Review of Austrian Economics* 10, no. 1 (1997), pp. 49–79.

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In a loan contract, the creditor conveys title to money (the principal) to the debtor in exchange for a present agreement to a future transfer of money (principal plus interest) from the debtor to the creditor. For example, Jim borrows $1000 now from Bank to be repaid in a year with $100 interest. Analyzed in terms of title transfers, Bank transfers title to $1000 of its money to Jim in the present, in exchange for (conditioned on) Jim contemporaneously agreeing to a title transfer to future property; and Jim's future title transfer is executed in exchange for the contemporaneous $1000 title transfer.

A contract in which payment is to be made for the performance of a service, such as an employment arrangement, is not an exchange of titles because the employee does not transfer any title. Although it may be referred to as an exchange of title for services, such a contract is better viewed as a unilateral, but conditional, future transfer of title to the monetary payment, conditioned upon the specified services being performed. That is, *if* you mow my lawn, *then* title to this gold coin transfers to you. Again, the transfer of title in this case is both expressly conditional and future-oriented. Title to the coin transfers only if the lawn is mowed, and I still own the coin.

Also, as evident in the beanie baby example above, the title-transfer theory of contract permits gift contracts as well as exchanges. Conventional legal systems are reluctant to enforce gift contracts because of the lack of consideration. Under the rubric of "hard cases make bad law" (such as the grandfather promising to pay his granddaughter's tuition), such systems use the circular theory of promissory estoppel to enforce such contracts.

The title-transfer theory of contract, on the other hand, does not discriminate between gratuitous and onerous contracts.[28] The owner of property may convey title to another, for any reason, whether pecuniary, charitable, or arbitrary, by manifesting his intent to do so. Gifts of property or title exchanges are all operative and, thus, enforceable.

Enforcement of Promises

Although a variety of contractual arrangements can be constructed using conditional transfers of title, there would seem to be no way to compel someone to perform an agreed-upon *action*, such as a service. The only way to actually *enforce* a promise to perform a given action

[28]See *La. Civ. Code*, arts. 1909–1910, describing gratuitous and onerous contracts.

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is to have the right to inflict force, either as punishment or as inducement to perform, on the defaulting party's body. A promise to paint a house or sing at a party, for example, can be enforced only by threatening to use force against the promisor to force him to perform, or by punishing him afterward for failing to perform.

However, under libertarian theory, there are only three ways that it is permissible to use force against the body of another: if he consents to the force, if he is committing or has committed aggression, or if his body is owned by someone else.

As noted above, the making of a promise is not the commission of aggression. At most, promises are evidence of an intent to transfer title. Therefore, there is no aggression to justify the enforcement action. Assuming the promisor does not consent to being punished, the second option is likewise unavailable. The third option assumes that the promisor has, in effect, transferred his rights in his body to the promisee, i.e., sold himself into slavery. However, although one may be considered to be a self-owner, one's body is inalienable.[29]

Therefore, contracts involve only conditional transfers of title to scarce resources external to the body. Promises cannot actually be enforced. The inability of the title-transfer theory to enforce promises might be seen, by some, as a defect of the theory. They predict chaos and the loss of the ability to have binding commitments. However, as noted above, even in modern legal systems, there is almost never enforcement of contractual obligations "to do" things. The primary enforcement mechanism utilized is to order the party in breach of contract to pay money damages to the other party, not to perform the promised service. The inability to "enforce" promises in today's legal system has not resulted in the death of contract.

The same result can be obtained under the title-transfer theory of contract by using conditional title-transfers to provide for "damages" to "enforce" promises to perform. When a contract to do something is to be formed and the parties want there to be an incentive for the specified action to be performed, the parties agree to a *conditional* transfer of title to a specified or determinable sum of monetary damages where the transfer is conditional upon the promisor's *failure* to perform.[30]

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[29]See the section on "Clarifications and Applications," below.

[30]See Rothbard, "Property Rights and the Theory of Contracts," pp. 138–41; Evers, "Toward a Reformulation of the Law of Contracts," p. 9; Barnett, "A

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This provides a result similar to today's system where the party who fails to perform owes monetary damages to the other party.

For example, if Karen wants to "hire" Ethan to paint her house, she agrees to pay Ethan $3000 on a specified future day X if he has painted her house by that day. In other words, Karen makes the following conditional conveyance of title: "I hereby transfer title to $3000 to Ethan on day X IF he has painted my house (and IF I own $3000)." But such a unilateral arrangement only obligates Karen. She may want to give Ethan an extra incentive to perform (in addition to the prospect of payment and his promise-keeping reputation). For example, she may be planning an important business-related poolside party at her house, for which it is important that various promisors perform certain actions, such as mowing the lawn, cleaning the house and the pool, and showing up to serve as waiters and chefs. She would like to be able to obtain *damages* from Ethan in the event of nonperformance, and can, thus, contract with him so that he agrees to pay a specified or determinable sum of money *in the event that* he does not perform.

In sum, conditional title transfers can be used to provide for damages payable upon nonperformance of a promised service. This provides for almost the same type of enforcement mechanism used in modern legal systems, in which contracts are widely used and relied upon.

CLARIFICATIONS AND APPLICATIONS

Transfer of Title to Homesteaded Resources

The title-transfer theory of contract assumes that the property owner can transfer title in the property to others by manifesting his intent to do so. The theory takes for granted that ownership of homesteaded property is *alienable* by the will of the owner. Writes Rothbard: "The right of property *implies* the right to make contracts about that property: to give it away or to exchange titles of ownership for the property of another person."[31]

Consent Theory of Contract," p. 304 n. 143; and Randy E. Barnett, "Contract Remedies and Inalienable Rights," *Social Philosophy & Policy* 4, no. 1 (1986), pp. 179–202, at 190–91, 197, discussing similar performance-enforcing schemes through title-transfers to "money damages," which Rothbard and Evers refer to as a performance bond.

[31]Rothbard, "Property Rights and the Theory of Contracts," p. 133, emphasis added.

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Yet, we must ask, why does manifesting one's intent to transfer title actually do it? Why does the owner have the power or ability to do this? This power is implied by several interrelated aspects of the ownership of homesteaded property. First, note that the owner, who has the sole right to control the resource, can permit others to use it. For example, he can lend his ox to his neighbor. This highlights the distinction between *ownership* and *possession*. The owner has rights to a thing even if he does not possess it. Note also that "permitting" others to use one's property is done by manifesting (communicating) one's consent to the borrower. The manifested consent of the owner of a good to permit its use by others is what distinguishes a licit act (such as a loan) from an illicit act (such as theft); it is what distinguishes invited guests from trespassers. In short, because the owner of property has the right to control it, he can, through a sufficiently objective manifestation or communication of his consent, permit others to possess the thing while he maintains ownership.

Second, homesteaded property was at one time *acquired*. It can, therefore, also be abandoned. One is not stuck with something forever just because one once homesteaded it. But acquiring and abandoning both involve a manifestation of the owner's intent. Recall that the very purpose of property rights in scarce resources is to prevent conflicts over the use of resources. Thus, property rights have an unmistakably public aspect: the property claimed has boundaries visible (manifested) to others.[32] One essential aspect of property is that it publicly demarcates one's bounds of ownership so others can avoid using it. If the bounds are secret and unknowable, conflicts cannot be avoided. To know *that* a thing is owned by another and to avoid uninvited use of the other's property, the property's borders must be publicly known.

In fact, one reason that the first *possessor* of a scarce resource acquires title to it is the need for borders to be objective and public. The result of using a thing—either by transforming the thing in an apparent way up to certain borders or by setting up a publicly discernible border around the property—can be objectively apparent to

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[32]In this sense, all property is "public," not "private." On the objective function of property rules, see Hoppe, *A Theory of Socialism and Capitalism*; and Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (Boston: Kluwer, 1993); also Barnett, "A Consent Theory of Contract," p. 303: "Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function."

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others. This is why Hoppe refers to acts of original appropriation as "embordering" or "produc[ing] borderlines for things."[33]

Acquiring is an action by which one manifests intent to own the thing by setting up public borders. Likewise, property is abandoned, and title thereto is lost, when the owner manifests intent to abandon and, thereby, to relinquish ownership. This intention is not manifested merely by suspending possession or transferring it to another, since possession can be suspended without losing ownership. Thus, a farmer who leaves his homesteaded farm for a week to buy supplies in a far away city does not thereby lose ownership, nor has he manifested any intent to abandon his farm. For these reasons, an owner of acquired property does not abandon property merely by not-possessing it, but he *does* have the power and the right to abandon it by manifesting his intent to do so.

Ownership of acquired property includes the right to use the property, to permit (license) others to use it (maintain ownership while giving possession to another), and to abandon ownership by manifesting the intent to do so. Combining these aspects of ownership, it is clear that an owner of property can transfer title to another by "abandoning" the good in favor of a designated new owner. If one can abandon title to property to the world in general, then *a fortiori* one can do "less," and simply abandon it "in favor" of a given person.[34]

Consider the case where the owner abandons the property outright. In this case, it once more becomes unowned and available for appropriation by a new homesteader, i.e., the next person to possess it. For example, suppose one lends his ox to a neighbor, and then abandons it. In this case, the neighbor at first has possession, but not title, to the ox. When the owner abandons it, the ox becomes unowned again. As

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[33]Hoppe, *A Theory of Socialism and Capitalism*, p. 13; also pp. 140–41.

[34]The theory for transferring property herein advocated bears a conceptual resemblance to the common-law practice of "quitclaiming." Conventional conveyances of property operate by a deed, but a quitclaim deed operates by way of a *release*. It is intended to pass any title or right owned by the transferor to the transferee, without warranting that anything is, in fact, owned. See Gregory Michael Anding, Comment, "Does This Piece Fit?: A Look at the Importation of the Common-Law Quitclaim Deed and After-Acquired Title Doctrine into Louisiana's Civil Code," *Louisiana Law Review* 55 (1994), pp. 159–77; and *Black's Law Dictionary*, defining "quitclaim." The quitclaim is a type of abandonment "in favor" of another, which effectively functions as a conveyance or transfer of the title.

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an unowned resource, it is now subject to re-appropriation by the next possessor, who happens to be the neighbor who is already in possession.[35] By combining the power to permit others to use property with the power to abandon, it is possible to transfer title to a particular transferee.

Another way to look at it is to consider the general rule that the first possessor has better title in the property than other challengers who are, compared to the first possessor, latecomers. If property is abandoned conditionally in favor of a particular transferee, then the transferee has "better title" because, as between these parties, the previous owner has abandoned it, and, thus, does not have better title. And as between the transferee and any third party, the transferee benefits from the prior title of the previous owner because, from the point of view of the third parties, the transferee is a licensee of the prior owner, and/or an earlier possessor than the third parties.

As an analogy, consider a person sitting in a tree with his loaf of bread. Below him, others occasionally pass. He can eat the bread if he wishes, or hold onto it, or, if he wants, he can just drop it, abandoning it to whichever passerby seeks to pick it up. This would be analogous to outright abandonment. Or, he can toss it to a particular friend in the crowd, thus abandoning it and "guiding it" to a desired recipient at the same time.

This is the reason why an owner can transfer title to others: scarce unowned resources are acquired, and can be abandoned. Property that can be abandoned by manifesting's one's consent to undo or cease a previous acquisition can be given to particular others.

Property in the Body

Under libertarianism, an individual has the sole right to control his body as well as scarce resources originally appropriated by the individual or by his ancestor in title. Since ownership means the right to control, an individual may be said to own his body and homesteaded resources he has acquired. He is a "self-owner" as well as an owner of acquired resources. In the case of acquired resources, the rights of ownership include the right to transfer title to others because one can *abandon*, by manifested intent, a previously unowned resource that

[35]The owner need not wait until the owner-to-be has possession to make the transfer. For example, the owner could make his abandonment conditional upon the desired recipient possessing the property.

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was *acquired* by manifested intent. In other words, rights in acquired resources may be alienated at will because of the way in which they come to be owned.

By contrast, although one may be said to own—to rightfully control—one's body, the same reasoning regarding acquisition, abandonment, and alienability does not apply. The act of *acquisition* presupposes that there is an individual *doing the acquiring*, and an *unowned thing* acquired by possessing it. But how can someone "acquire" his body? One's body is part of one's very identity. The body is not some unowned resource that is acquired *by* the intentional embordering action of some external, already existing acquirer.

Because the body is not some unowned resource that an already existing individual chooses to acquire, it makes little sense to say that it can be abandoned by its owner. And since alienation of property derives from the power to abandon it, the body is inalienable. A manifestation of intent to "sell" the body is without effect because a person cannot, merely by an act of will, abandon his or her body. Title to one's body is inalienable, and it is not subject to transfer by contract.

Rothbard on Inalienability

Rothbard, viewing contracts as transfers of title to alienable property, rejected the enforceable-promises view of contracts, with mere promises being unenforceable. He also maintained that rights to control—i.e., one's ownership of, or title to—one's body were inalienable.

These views are not unrelated. In fact, promises being unenforceable necessarily implies the inalienability of the body, and vice versa. If promises were enforceable, then one could be punished or coerced into performing, implying some rights in the body had been alienated merely by making the promise. And if one could alienate title to one's body by an act of will, this would mean that promises could be enforceable. For example, one could make a conditional transfer of title to one's body *if* one does not perform a specified service. This would justify punishment or coercion against the promisor's body, which is now owned by the promisee. Thus, alienability of the body and the enforceable promises view of contract go hand in hand. One implies the other.

So Rothbard, in rejecting the enforceable-promises theory of contract, has to also reject body alienability, as he does. However, this conclusion is apparently inconsistent with other strands of his rights theory. Rothbard wrote that "[t]he right of property *implies* the right

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to make contracts about that property."[36] Since he also views individuals as "self-owners," meaning that one owns one's body, then one has "the right to make contracts about that property," according to his earlier pronouncement. To avoid accepting body alienability, Rothbard must find a reason why the body, although owned, is *not* alienable—even though the owner of property "can make contracts about it."

What argument does he produce to show that our bodies are not alienable? Like other libertarians, Rothbard, in essence, argues that slavery or other personal service contracts are not enforceable because there is some sort of logical *impossibility* involved in voluntarily alienating one's rights to one's body.[37] He reasons that it is literally impossible to transfer one's actual will to another, so a promise to do so is null and void; title thereto cannot be transferred. It is like contracting to sell the sun to someone. Such a contract, having an impossible object, would be null and void from the outset.

The problem with this view is that it assumes that a person's will has to be transferred in order for him to become a slave, or for others to have the right to control his body. But this is not necessary. Rather, the slave owner need only have the *right* to use force against the recalcitrant slave. It is true that one cannot alienate *direct* control of his body; one person can have only indirect control of another's body. Yet, we own animals, even though the animals retain direct control over their actions. The owner exerts indirect control over the animal's actions, e.g., by coercing or otherwise manipulating the animal to get the animal to do what the owner desires.

Likewise, aggressors may be jailed or punished—in short, "enslaved"—by the victim or his agent or heirs.[38] In effect, the aggressor

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[36]Rothbard, "Property Rights and the Theory of Contracts," p. 133, emphasis added.

[37]Rothbard, *Ethics of Liberty*, pp. 40–41; and Rothbard, "Property Rights and the Theory of Contracts," pp. 134–36. See also Randy E. Barnett, *The Structure of Liberty: Justice and The Rule of Law* (Oxford: Clarendon Press, 1998), pp. 77–82; Barnett, "Contract Remedies and Inalienable Rights," pp. 186–95; Tibor R. Machan, *Human Rights and Human Liberties* (Chicago: Nelson Hall, 1975), pp. 116–17; George H. Smith, "A Killer's Right to Life," *Liberty* 10, no. 2 (Nov. 1996), p. 49; and George H. Smith, "Inalienable Rights?" *Liberty* 10, no. 6 (July 1997), p. 54.

[38]For further discussion of the theory of inalienability and the legitimacy of punishment, see Kinsella, "Inalienability and Punishment"; and Kinsella, "A Libertarian Theory of Punishment and Rights."

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is owned by his victim. This is despite the fact that the jailed aggressor still retains a will and direct control of his body; the jailer can only exert indirect control over him. The "impossibility" of an aggressor alienating his will does not prevent him from alienating *title* to his body—giving someone else the right to exert (admittedly indirect) control over his body—by committing an act of aggression.

It would seem, therefore, that the impossibility of alienating one's will does not prevent a person from being owned by others, or others from having *rights* to control the person's body. Thus, the impossibility of alienating the will should not be a barrier to making contracts regarding the right to control one's body.

Rothbard's error was to presume that property ownership implies the power to transfer the property's title. This necessitated the convoluted and flawed impossibility-of-the-will argument in favor of body-inalienability. The modified title-transfer theory proposed here recognizes that the body is "owned" only in the sense that a person has the sole right to control the body and invasions of its borders. But the body is not homesteaded and acquired, and cannot be abandoned by intent in the same way that homesteaded property can.

Theft and Debtors' Prison

Rothbard and Evers view failure to pay a debt or other agreed upon future title transfer as "implicit theft." Writes Rothbard:

> The debtor who refuses to pay his debt has stolen the property of the creditor. If the debtor is able to pay but conceals his assets, then his clear act of theft is compounded by fraud. But even if the defaulting debtor is not able to pay, he has *still* stolen the property of the creditor by not making his agreed-upon delivery of the creditor's property.[39]

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[39]Rothbard, "Property Rights and the Theory of Contracts," p. 144; also see pp. 137–38. Evers states: "Once the money falls due, the debtor who does not pay up is defrauding the creditor and is unjustly detaining his property . . . *even if* the debtor does not have the funds on hand to pay the creditor." Evers, "Toward a Reformulation of the Law of Contracts," p. 11 n. 5, emphasis added. David Boaz, *Libertarianism: A Primer* (New York: The Free Press, 1997), pp. 80–81, mirrors Rothbardian contractual analysis, as well as the Rothbardian error that it is implicit theft for a debtor to fail to pay a debt on the due date. See also Rothbard, *Man, Economy, and State*, pp. 152–55.

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Rothbard is partly correct here. If, on the due date, the debtor is able to pay, then refusal to pay is theft. This is because the title to some of the money held by the debtor transferred to the creditor on the due date. At that moment, the debtor is in possession of the creditor's property. Failure to turn it over is tantamount to theft or trespass—it is a use of the creditor's property without his permission.

But Rothbard's view that it is theft "even if the defaulting debtor is not able to pay" is unjustified. Rothbard senses that this position could justify debtors' prison, but tries to avoid this result by arguing that imprisoning a defaulting debtor goes "far beyond proportional punishment" and, thus, is "excessive."[40] But why? If failure to pay a debt is "implicit theft," why can't the "thief" be treated as such and punished?

The solution is to recognize that the defaulting debtor may not be punished simply because he is not a thief at all. If the debtor is bankrupt, there is no property to steal. The debtor is not "refusing" to turn over "the" money owed. There *is* no money to be turned over. How can there be theft of a non-existent thing? As discussed above, all future title transfers are necessarily conditioned on the thing's existing at the specified transfer time. Failure to transfer something that does not exist cannot be theft; rather, one of the conditions for the title transfer has simply not been satisfied.[41]

Of course, contracts would normally contain default or explicit ancillary title transfers to address the unavoidable possibility of future default. For instance, a default title transfer that is ancillary to the main title transfer might be that the debtor also transfers title to $1100 plus accrued interest at any time after the original due date, if he is unable to repay on the due date, if and when he gets a paycheck or otherwise comes into money. Such ancillary provisions can be explicit in written contracts, or be assumed as default provisions in accordance with custom and context.

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[40]Rothbard, "Property Rights and the Theory of Contracts," p. 144.

[41]For similar reasons, Rothbard is also incorrect that a prospective employee who receives advance payment for future performance is necessarily a thief if he does not return the money. Only if the prospective employee still possesses the money and then refuses to pay it is he a thief. Similarly, I believe Rothbard is incorrect in assuming that failure to meet a performance bond (monetary damages payable in the event of non-performance) is "implicit theft" from the promisee. See Rothbard, "Property Rights and the Theory of Contracts," pp. 137–38.

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Fraud

The theory of contract espoused here demonstrates that fraud is properly viewed as a type of theft. Suppose Karen buys a bucket of apples from Ethan for $20. Ethan represents the things in the bucket as being *apples*, in fact, as apples of a certain nature, that is, as being fit for their normal purpose of being eaten. Karen conditions the transfer of title to her $20 on Ethan's not knowingly engaging in "fraudulent" activities, like pawning off rotten apples. If the apples are indeed rotten and Ethan knows this, then he knows that he does *not* receive ownership of or permission to use the $20, because the condition "no fraud" is not satisfied. He is knowingly in possession of Karen's $20 without her consent, and is, therefore, a thief.[42]

Conclusion

The title-transfer theory of contract avoids the problems of detrimental reliance and consideration-based defenses of contract. It permits gratuitous contracts without inventing arcane doctrines or burdensome formalities, and provides a conceptually elegant theory of contract that can provide damages for breach of promises to perform, similar to modern legal systems.

This view of contract also solves the problems of voluntary slavery contracts and debtors' prison and avoids convoluted arguments for inalienability. Finally, the framework presented herein provides a justification for outlawing fraud.

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[42]Thus, James W. Child, "Can Libertarianism Sustain a Fraud Standard?" *Ethics* 104, no. 4 (July 1994), pp. 722–38, at 722, is incorrect in concluding that "the basic moral principles of libertarianism do not support a prohibition of fraud." For further discussion of the law of fraud, see Barnett, "Rational Bargaining Theory and Contract"; and Rothbard, "Property Rights and the Theory of Contracts," p. 143.

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TOWARD A LIBERTARIAN THEORY OF INALIENABILITY: A CRITIQUE OF ROTHBARD, BARNETT, SMITH, KINSELLA, GORDON, AND EPSTEIN

Walter Block*

The Declaration of Independence maintains that:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.

If what is meant by this is that people should have the right not to be murdered, their persons and legitimately owned property should not be invaded, and that they may pursue happiness in any way they wish as long as they do not thereby violate the equal rights of all others to do the same, this is perfectly compatible with libertarianism, the philosophy based on homesteading, personal and property rights, the non-aggression axiom, contract, and laissez faire capitalism.[1]

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[1]On fundamental libertarianism and rights, see Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973); Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998); Murray N. Rothbard, "Law, Property Rights, and Air Pollution," in *Economics and the Environment: A Reconciliation*, ed. Walter Block (Vancouver, B.C.: Fraser Institute, 1990); Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer, 1989); Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (Boston: Kluwer, 1993); Anthony de Jasay, *The State* (Oxford: Basil

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Unfortunately, however, the doctrine of inalienability as construed by many is very different from this. So much so, I shall argue, that it is almost diametrically opposed to the libertarian notion of private property and free enterprise.

How can this be? At the outset, it pays to define terms. Various definitions of inalienability include non-relinquishability, non-salability, and non-transferability.[2] What does this mean with regard to the right to life or liberty? If this right is non-transferable, then I cannot confer it on you, that is, I cannot make a gift of myself to you; I cannot voluntarily agree to be your slave. If it is non-salable, then I cannot sell myself to you as a slave.

However, the following scenario will illustrate a problem. You are a rich man who has long desired to have me as a slave, to order about as you will, even to kill me for disobedience or on the basis of any other whim which may occur to you. My child has now fallen ill with a dread disease. Fortunately, there is a cure. Unfortunately, it will cost one million dollars, and I, a poor man, do not have such funds at my disposal. Fortunately, you are willing to pay me this amount if I sign myself over to you as a slave, which I am very willing to do since my child's life is vastly more important to me than my own liberty, or even my own life. Unfortunately, this would be illegal, at least if the doctrine of inalienability (non-transferability) is valid. If so, then you, the rich man, will not buy me into slavery, for I can run away at any time, and the forces of law and order will come to *my* rescue, not yours, if you try to stop me by force.

There is another way to put this matter. As a first approximation, commodification can be defined as the opposite of inalienability. (To do this is, in effect, to consider inalienability as non-salability).

Blackwell, 1985); Robert McGee, "If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?" *American Journal of Jurisprudence* 38 (1993), pp. 335–58; and Robert McGee, "A Theory of Secession for Emerging Democracies," *Asian Economic Review* 33, no. 2 (August 1991), pp. 245–65.

[2]Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review* 100, no. 8 (June 1987), pp. 1849–50; Randy Barnett offers a definition of alienable as "interpersonally transferrable." Randy E. Barnett, "Contract Remedies and Inalienable Rights," *Social Philosophy & Policy* 4, no. 1 (Autumn 1986), p. 184. On the next page, he writes: "To characterize a right as inalienable is to claim that the consent of the right-holder is insufficient to extinguish the right or to transfer it to another."

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Thus, the debate concerns which rights, which aspects of the human condition, which relationships, can legally be sold, and which cannot. In order to be inclusive and exhaustive, we will construct a spectrum of commodification options.

At the extreme left would be those who oppose sales, markets, and prices for *anything*. In this viewpoint, held mainly by the dictators of such countries as North Korea and Cuba, and by professors of sociology, literature, and religion at American universities, *everything* would be inalienable.[3] Instead of greedy profit-driven enterprise, the economy would be organized around the socialist principles of central planning and "benevolence."

At the extreme right would be the libertarian philosophy I shall defend which maintains that *everything* should be legally alienable or commodifiable.[4]

The middle ground, occupied by virtually all scholars who have written on the subject, even those who consider themselves and are widely considered to be libertarians, is the thesis that while perhaps it should be legal to sell some (or most) goods or items, this does not apply in all cases. That is, there are some things which should be declared legally inalienable—whether by sale, gift, or relinquishment—or non-commodifiable.[5]

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[3]If I exaggerate, it is but slightly.

[4]The position on voluntary slavery which I support in this article is not well accepted by libertarians. See Walter Block, "Voluntary Slavery," *Libertarian Connection* 6, no. 1 (1970). To the best of my knowledge, Robert Nozick is the only other libertarian writer who has supported this position, in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 58.

[5]Some variant of this position is held by such libertarian stalwarts as Rothbard, *Ethics of Liberty*; George Smith, "Inalienable Rights?" *Liberty* 10, no. 6 (July 1997); Randy E. Barnett, "Pursuing Justice in a Free Society: Part One–Power vs. Liberty," *Criminal Justice Ethics* (Summer/Fall 1985); Barnett, "Contract Remedies and Inalienable Rights"; Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998); David Gordon, "Private Property's Philosopher," *Mises Review* 5, no. 1 (Spring 1999); Richard Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* 2 (1973); Richard Epstein, "Possession as the Root of Title," *Georgia Law Review* 13 (1979); Richard Epstein, "Past and Future: The Temporal Dimensions in the Law of Property," *Washington University Law Quarterly* 64 (1986); N. Stephan Kinsella, "Inalienability and Punishment: A Reply to George Smith," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–99); and Jörg Guido Hülsmann,

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CLARIFYING THE ISSUE

Before mentioning specifics other than life and liberty, let us clear away the underbrush a bit. By their very nature, there are things which *cannot* be sold, given away, relinquished, or in any other way transferred. For example, what about selling a square circle? Due to the laws of logic, there is not and cannot be any such entity. Since it cannot exist, it cannot be sold, given away, or alienated in any way.

Next, consider true love or friendship. If the only way I can get you to spend time with me is to pay you for it, then whatever you are giving me (baby sitting, sexual services, companionship) *cannot* be friendship or love, since we define these things in a way that necessarily precludes them from being sold, as a matter of linguistics.[6] No one can claim that it should be legal to buy or sell true love, any more than he can claim it should be legally permissible to engage in comercial relationships concerning a square circle. Since it cannot be done in any case, passing a law prohibiting it is superfluous.

However, here are two more complicated ways of looking at the matter. First, you can't sell your true friendship for money, but you can fake it. However, having done this, you might well one day come to have true feelings of friendship for the person you were duping. Then, on that day, if you continue to accept payment, you now *are*, for the first time, selling true friendship or love, so this is not inalienable by nature.[7]

Second, you *can* sell true love and friendship. This applies at least in the case of some people. When babies are two years old, their taste in friends is vague and amorphous. Almost any other two year old will do. Suppose there are two applicants, but only one friendship slot

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"A General Theory of Error Cycles," *Quarterly Journal of Austrian Economics* 1, no. 4 (1998).

[6]Something of the same sort is at work regarding the claim that two people cannot occupy the same place at the same time. This is not so much a physical claim as it is a linguistic one. The point is whatever size is the territory, we tautologically define "place" and "time" in such a way as to make the original contention necessarily true. It is in this sense that one cannot sell true love.

[7]For this to be true, true love or friendship is based on feelings which may or may not occur. This is an empirical issue, not one of logic; we are not defining true love or friendship in such a way so as to logically preclude it, if you accept money for exhibiting these feelings.

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(toddlers have to sleep a lot), and one of them offers toys in payment. The given child can prefer one and reject the other; if he does, he will be selling his true friendship. He is indiscriminate in that any of the potential playmates will do as well as any other. But one of them offers more than the second: a free toy. Many adults, too, are pretty indiscriminate in their affections (e.g., nymphomaniacs). These people most certainly *can* sell their true friendship, such as it is.[8]

What about the right to commit sneezes (or eye blinks)? It might be contended that because these are involuntary acts, they cannot be alienated. This is certainly true in the sense that no one has (much) control over whether he sneezes (or blinks his eyes). However, alienating can also be interpreted to mean only that you agree to pay a penalty if you violate your contract not to engage in such involuntary acts. "I'll sell you the right to control my sneezing (or eye blinks). Here's the deal. Every time I sneeze (or blink my eyes), I'll pay you $1." Or, "if I sneeze (or blink my eyes), you can kill me."

What about selling moral responsibility? The denial of this, too, is an attack, at least implicitly, on the doctrine of radical or total alienability. There are several ways to handle this criticism:

1. We need not be able to sell moral responsibility in order to justify voluntary slavery.

Voluntary slave contracts have only to do with property rights over humans, not metaphysical issues. If the agents of law witness a master forcibly confining a slave to the plantation and/or whipping him, may they legitimately stop him? This is the real question involving voluntary slavery; matters of guilt, responsibility, etc., are only secondary at best.

2. We *can* sell moral responsibility.[9]

Suppose a mob boss buys moral responsibility from a hit man; the hit man sells his moral responsibility to the boss. This means that if the hit man gets caught for a crime, the boss will shoulder his responsibility. Sure enough, the hit man commits a crime and is caught, so

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[8]I owe this example to Matthew Block.

[9]We are really discussing legal responsibility, not moral responsibility. The former, not the latter, is within the domain of libertarianism. I owe this point to Stephan Kinsella who, despite the fact that I herein criticize his own views, has taken great pains to improve earlier drafts of this paper. His disinterested search for the truth is an example for all of us, one which I will try mightily to emulate when I find myself on the other end of a similar exercise.

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the boss offers to pay the penalty forfeited by the hit man. There is no logical contradiction in this (of course, most bosses will not agree to carry through on the deal, but that is another matter). If he has agreed to bear the hit man's responsibility, we can force the boss to do so.[10]

But suppose the victim objects. He wants the perpetrator (the hit man) to pay for his crime, not someone else (the mob boss). Does the victim have this right? No. He may only demand to be paid what he is objectively owed; he may not compel specific performance from the guilty party. Suppose that the crime was murder, and that the payment for this crime was the life of the murderer. We happen to have a machine which will transfer the life out of the live murderer, and into the body of the dead victim, such that after the transfer, there will be an alive victim, and a dead murderer. If a life is a life is a life, that is, all lives given up in this way are of equal value, then the victim has no right to object to this substitution. On the other hand, if the hit man is 25 years old, and the boss 75, and what may be transferred is only unexpired life expectancy (such that the hit man can give the victim, say, 55 more years, while the boss can only give 5 more), then the victim certainly has a legitimate complaint. In this case, the sale of moral responsibility could not be consummated, but not because of any intrinsic objection to it. It is just that the boss didn't have the wherewithal with which to make the purchase. That is, the ages of the boss and hit man are not intrinsic to the case, and may even be reversed, for illustrative purposes, in which case the sale could have succeeded.

The underlying point of the libertarian critique is that if I own something, I can sell it (and should be allowed by law to do so). If I can't sell it, then, and to that extent, I really don't own it. Take my own liberty as perhaps the paradigm case of the debate over inalienability. The claim is that if I really own my liberty, then I should be free to dispose of it as I please, even if, by so doing, I end up no longer owning it. Clearly, since I cannot own a square circle, I cannot sell it. If I can own my own ability to give true love, then I can sell it; if I logically cannot own this attribute, then, of course, I cannot give, barter, or sell it to anyone else.

My thesis: No law should be enacted prohibiting or even limiting in any way people's rights to alienate those things they own. This is "full monte" alienability, or commodification.

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[10]This is an insurance policy of sorts. I owe this point to Stephan Kinsella. However, if the boss runs away, then the hit man must pay the penalty due to the victim. In this case, he will have failed to sell his moral responsibility.

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OBJECTIONS

Having made a first run at the problem, I now consider a series of objections to it, the better to flesh out the precise meaning of the thesis that voluntary slavery is compatible with libertarianism.

Suppose that the master says to his human property, "Now that you are my slave and must obey me, give me back that $1 million I just paid for you."[11] Yes, indeed, this sort of ploy would stop voluntary slavery dead in its tracks. Were the master be able to get away with it, this would place a chill on all such subsequent deals. However, there are several ways to respond. First, the slave could have already given the money to a third party, e.g., his child's doctor, in our canonical case. He could have done this at the very next instant after the slave contract was consummated, before the master could employ this gambit. Second, the contract could stipulate that the master cannot order the slave to refund the money. Here, there would not be "full" slavery in that the master would be prohibited from taking one (but only one) action vis-à-vis his new human property. Third, at most, this example proves it was foolish to sell yourself into slavery, not that it was wrong, illicit, or contrary to libertarianism. It would be like agreeing to work for $1 per year. Silly, perhaps, but no rights violation.[12]

MURRAY N. ROTHBARD

As with so much else in libertarian theory, Murray N. Rothbard took the lead in adumbrating a theory of inalienability as it pertains to slavery. Rothbard takes the position that:

> The distinction between a man's alienable labor service and his inalienable will may be further explained; a man can alienate his labor service, but he cannot *sell* the capitalized future value of that service. In short, he cannot, in nature, sell himself into slavery and have this sale enforced—for this would mean that his future will over his own person was being surrendered in advance. In short, a man can naturally expend his labor currently for someone else's benefit, but he cannot transfer himself, even if he wished, into

[11]Rothbard, in *Ethics of Liberty*, p. 135 n. 2, summarizing an argument by Jean-Jacques Rousseau, writes: "If a man sells himself into slavery, then the master, being an absolute master, would then have the right to commandeer the funds with which he had 'bought' the slave."

[12]I owe this example, and this solution, to David Gordon, another example of a colleague and friend helping me to improve a paper with which he disagrees.

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> another man's permanent capital good. For he cannot rid himself of his own will, which may change in future years and repudiate the current arrangement. The concept of "voluntary slavery" is indeed a contradictory one, for so long as a laborer remains totally subservient to his master's will voluntarily, he is not yet a slave since his submission is voluntary; whereas, if he later changed his mind and the master enforced his slavery by violence, the slavery would not then be voluntary.[13]

I offer a few introductory remarks before giving reasons for disagreeing with this perspective. I view my criticisms of Rothbard not as overturning his entire system of liberty, which is based on private property, self-ownership, and the non-aggression axiom. To the contrary, I interpret these critical remarks as an attempt to *support* his overall system by supplying a corrective to a very minor part of it. If Rothbard is wrong in his interpretation of libertarian law in this one instance, as I hope to show, this does not put at risk the entire edifice. Rather, such a critique *strengthens* it, by showing that contract, predicated on private property reach to the furthest realms of human interaction, even to voluntary slave contracts.

Why, then, do I disagree with this author? There are several reasons. First of all, a man *can* "rid himself of his own will." He can do so by, for example, subjecting himself to a frontal lobotomy. Stephan Kinsella has suggested that in the future, there will doubtless be invented a "zombie" pill which turns people into animated automatons with no will of their own. On that day, it will indeed be possible for a man to "rid himself of his own will." But if this can be attained in the years to come, the reason it cannot now be done is merely a technical matter, not one pertaining to philosophy.[14] States Kinsella:

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[13]Rothbard, *Ethics of Liberty*, pp. 40–41.

[14]Williamson Evers, "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies* 1 (Winter 1977), p. 7, points to "the natural fact that each human is the proprietor of his own will. To take rights like those of property and contractual freedom that are based on a foundation of the absolute self-ownership of the will and then to use those derived rights to destroy their own foundation is philosophically invalid." Rothbard, *Ethics of Liberty*, p. 135, cites this passage approvingly.

However, there are difficulties with this position. Property and contractual freedom, contrary to Evers, are not predicated on the absolute self-ownership of the will. Indeed, to put matters in this way is to assume as proven the very issue under contention. While it is extremely difficult to imagine a libertarian

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> If the "impossibility" of literally alienating one's will means that it is impossible to be bound by contract to act as someone's slave, why is it not "impossible" to imprison an aggressor to enforce restitution? After all, even a convicted aggressor still has a will. Why is it not "impossible" to defend oneself with force? And yet it is *not* impossible for consent to be irrevocably granted, as we have seen; this condition exists for a justly imprisoned aggressor. Recipients of defensive, restitutive, or retaliatory force all retain a will, which is overwhelmed with some type of responsive force.[15]

Second, in any case, the "will" is irrelevant to our deliberations. We are debating not over the will, but over the body, that is, over the right to engage in the use of violence against a person's *body* who sells himself into slavery and then reneges on this contract.

Third, contrary to Rothbard, "for so long as a laborer remains totally subservient to his master's will voluntarily," he is *still* a slave, even though he does so voluntarily. Suppose I am kidnapped, forcibly taken from my home, placed in a dungeon, and coerced into shoveling coal. But then, my spirit broken, I do these tasks without demur, voluntarily, as it were. Nevertheless, I *remain* a kidnapee, despite these considerations.[16] Nor can I accept Rothbard's contention that if the slave "later changed his mind and the master enforced his slavery by violence, the slavery would not then be voluntary." On the contrary, it would *still* be voluntary, in that the slave signed a contract which allowed the master to whip him for disobedience, and received an amount of money agreeable to him for taking on this role.

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society peopled solely by automatons, it is equally arduous to picture it populated by the dead. While will and life are necessary precedents for the free society, they do not constitute the intellectual foundation for it. This is provided by Hoppe's argument from argument, in *Socialism and Capitalism*, p. 131. In any case, even if the will is as crucial as Evers believes it to be, this still does not speak to the *sale* or alienation of the will, only to its existence.

[15]Kinsella, "Inalienability and Punishment," p. 90. In *Ethics of Liberty*, p. 135, Rothbard articulates this point as follows: "Each man has control over his own will and person, and he is, if you wish, 'stuck' with that inherent and inalienable ownership." In my view, we are not "stuck" with anything of the sort. At the very least, there is always the possibility of suicide.

[16]Some slaves in the antebellum U.S. sang songs as they picked cotton, and were so browbeaten they didn't even consider escaping or rebelling. Yet, for all that, they were still slaves.

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Rothbard continues his critique of the voluntary slave contract:

> Suppose that Smith makes the following agreement with the Jones Corporation: Smith, for the rest of his life, will obey all orders, under whatever conditions, that the Jones Corporation wishes to lay down. . . . The problem comes when, at some later date, Smith changes his mind and decides to leave. Shall he be held to his former voluntary promise? Our contention—and one that is fortunately upheld under present law—is that Smith's promise was not a valid (i.e., not an enforceable) contract. There is no transfer of title in Smith's agreement, because Smith's control over his own body and will are *inalienable*. Since that control *cannot* be alienated, the agreement was not a valid contract, and therefore should not be enforceable. Smith's agreement was a *mere* promise, which it might be held he is morally obligated to keep, but which should not be legally obligatory.[17]

Rothbard welcomes the fact that his "contention . . . is fortunately upheld under present law." The clear implication is that the law *could* have been other than it is, and the relevant judges, rather than being Rothbardians on this one issue, might have been Blockians. If so, then this is hardly a matter of philosophy. There is, then, no case for saying "that control *cannot* be alienated." Rather, the situation is that flesh and blood creatures made this decision, and that others *could* reverse matters. Consider the issue of the square circle in this regard. Here, it really *is* a matter of "cannot," rather than "would not." Square circles *cannot* be bought or sold since they *cannot* exist in the first place, and no subsequent set of judges or politicians can ever reverse this finding. Were a jurist to rule that a square circle contract was invalid, it is inconceivable that Rothbard would regard this decision as "fortunate." What would it even *mean* for a judge to determine that such a contract was valid? That one person had to turn over to another a square circle? The whole idea boggles the mind. Surely contracts for a square circle and for voluntary slavery occupy very different philosophical ground.

Further, the voluntary slave agreement is not a "mere" promise. Rather, it is a bona fide contract where consideration crosses hands; when it is abrogated, theft occurs. If you pay $1 million for the right to enslave me, and I spend it, work for a week at your plantation, change my mind, escape, and the forces of law and order refuse to turn me over to you, then I have in this manner stolen that amount of money

[17]Rothbard, *Ethics of Liberty*, pp. 135–36.

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as surely as if I broke into your vault and absconded with it. It is difficult to see why this commercial arrangement does not meet the specifications of Rothbard's own "title transfer" theory of contracts.

One public policy issue upon which we disagree concerns the status of the voluntary enlistee in the army who later deserts. The soldier knows full well that the penalty for such an act, particularly in the face of the enemy during battle, is summary execution. He is paid a salary which reflects the onerousness of these conditions. Rothbard defends the deserter on the ground that "the enlistment was a mere promise, which cannot be enforceable, since every man has the right to change his mind at any time over the disposition of his body and will."[18]

His will, yes, at least we have seen Rothbard's argument on this account. But how did his body come to form part of the equation? If you cannot even alienate your body, how can legal suicide be rationalized? Taking one's own life is surely an aspect of libertarianism in that, almost by definition, it does not constitute an uninvited border crossing or aggression against someone else. Here, the law as presently constituted runs counter to Rothbard's analysis. Soldiers are penalized with their very lives for desertion. According to Rothbard's theory, such enforcement "*cannot*" occur, but it most certainly *does*.[19]

Randy E. Barnett

Barnett starts off his analysis by distinguishing that which is forfeitable from that which is inalienable.[20] He cites McConnell to the effect that "A person who has forfeited a right has lost the right because of some offence or wrongdoing."[21] In other words, you can forfeit your

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[18]Rothbard, *Ethics of Liberty*, pp. 136–37.

[19]Kinsella, "Inalienability and Punishment," p. 91, n. 36, allows that a soldier who "enlist(s) in a volunteer army at a time of peril . . . may forcibly be restrained" to keep his end of the bargain. He makes this exception to his opposition to the enforceability of voluntary slave contracts on the ground that desertion "can be considered to be the cause of . . . physical harm" to the citizens of the country. In this, Kinsella follows Barnett, *Structure of Liberty*. But if, as Rothbard, Barnett, and Kinsella claim, it is a veritable law of nature that voluntary slave contracts are unenforceable, it is difficult to see how *any* exceptions whatsoever can be made. Rothbard here is more consistent with his erroneous view than are Kinsella and Barnett.

[20]Barnett, "Contract Remedies and Inalienable Rights," p. 186.

[21]Terrance McConnell, "The Nature and Basis of Inalienable Rights," *Law and Philosophy* 3 (1984), p. 28.

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right to freedom, say, by committing a crime and being incarcerated for this offense, but you cannot alienate this right by selling or giving it away.

But if a right is truly inalienable, it should also be non-forfeitable. Conversely, if a right is forfeitable, then, and to that extent, it *cannot* be inalienable. Barnett's position amounts to the assertion that someone can take away someone else's right to freedom (as in the case of jail for criminals), but that the person himself cannot on his own give up this right. If it is all right for someone else to *take* your freedom, why is it wrong for you to *give up* your freedom voluntarily? The implication of Barnett's position is that suicide should be prohibited by law, for here you are giving up your own life. But this implication is surely incompatible with the libertarian legal code.[22]

George Smith considers an objection to Barnett's rather startling claim that since the right to life is inalienable, it is non-forfeitable, so the death penalty cannot be justified: "Perhaps [the killer] initially possessed inalienable rights [like everyone else] but somehow forfeited these rights after committing his foul deed." But Smith replies in a devastating manner:

> This argument evidently proceeds from a peculiar definition of inalienable rights. Forfeiture, after all, is a mode of alienation. Let me be clear about this: by "inalienable," *I* mean "inalienable."[23]

One cannot but help side with Smith *vis-à-vis* Barnett on this issue. After all, if something is literally inalienable, it *cannot* be alienated.

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[22]To legalize suicide but not voluntary slavery is a logical contradiction. Some argue that in voluntary slavery, you give a "blank check" to your master, but since that would allow the master to use you for rights-violative purposes, it is illegitimate to engage in such a voluntary action. However, let us consider the case of suicide. When you kill yourself, or even when you die of natural causes, you have no guarantee as to what will be done with your body, and it may be used to violate the rights of an innocent party. Therefore, if voluntary slavery should be illegal because of the "blank check" argument, then so should suicide, and even death itself, on the same grounds. Since the latter is a nonsense—ought implies can, no one can stave off death under present technology, and it is a bit much to accuse of rights violations all of those who have died solely because of the fact that they died—and libertarians certainly favor the right to kill oneself, then they are logically compelled to accept the argument for the legalization of voluntary slavery.

[23]George Smith, "A Killer's Right to Life," *Liberty* 10, no. 2 (November 1996), p. 48.

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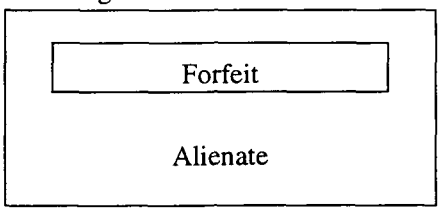
But if it cannot be alienated, then it cannot be separated from its owner for *any reason*. It is puzzling that Barnett can claim that a right is at once both inalienable and forfeitable.

As a matter of ordinary language, it is easy to make the distinction between alienability and forfeiture, but do the advocates of this distinction have a (logical) *right* to make it? I think not, for forfeiture is *part* of alienation. If a right is forfeited, it is *necessarily* alienated; it is no longer with the person, it is apart, or alienated, from him. On the other hand, if a right is alienated, it need not also be forfeited. For example, if the right is sold or given away, it is alienated but not forfeited. Thus, the position that a right ought to be capable of being forfeited but not alienated amounts to a logical contradiction.

The denial of this eminently sensible position means that no one can ever be punished for anything. Moreover, to disavow it even casts aspersions on the right of self-defense, for if someone is attacking you and you defend yourself, you cannot be acting rightly unless your attacker has forfeited (by his attack upon you) his right of bodily integrity. If he still retains that right (and he does, since he has not yet been found guilty of anything by a duly constituted court), then it would be improper on your part to invade his physical person, even in self-defense. This is an untenable position, since you, too, have the right to bodily integrity, and the only way to retain it is to ward off invaders through self-defense. But if people can forfeit rights (have them taken away by other people), then surely they can give away these rights of their own volition.

Consider Venn Diagram 1:



Venn Diagram 1

As we see, forfeiture is a subset of alienation. Here, alienate means *either* that you rid yourself of a right, or that someone else does this for you. In either case, the right is lost to the person.

However, it could be argued that the two concepts are entirely separate.[24] In Venn Diagram 2, they would be depicted as an apple and

[24]How plausible is this interpretation of language? In my own view, it is reasonable, in that the ordinary common usage of the words alienate and forfeit

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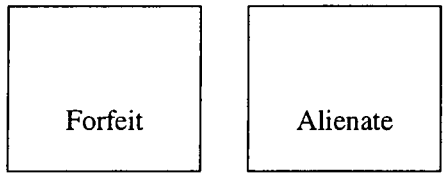
an orange, placed side by side with no overlap between them, let alone one of them encompassing the other, as in Diagram 1.



Venn Diagram 2

Let us consider this second possibility. Were it true, we could no longer draw the implication that if alienation is justified, then so is forfeiture. Nor could we claim, contrary to Barnett, that forfeiture cannot be justified in the absence of alienation. The two, now, in effect, are unrelated.

Barnett argues that forfeiture, but not alienation, is justified. I take the position that both are compatible with libertarianism. Given Venn Diagram 1, I am correct. Given Diagram 2, I judge it a tie between us. Whether Barnett is correct depends not upon the relation between forfeiture and alienation but upon which arguments can be utilized to justify alienation or non-alienation. It is to this task that we now turn.

Having laid the groundwork with this distinction, Barnett offers "four reasons for inalienability," or four justifications for his own position on the matter.

Barnett's First Reason[25]

Barnett's first reason is that:

> The nature of individual rights might rule out the alienation of certain of these rights. . . . To illustrate this, suppose A consents to an arrangement under which he will always unquestionably follow the commands of B. If such a consensual arrangement were legally and morally binding, then A would violate B's rights by refusing to do what B commands; A would be wrong to so refuse. Suppose, now, that B orders A to violate the rights of C.[26]

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are not precise enough to point clearly in one direction or the other. I consider both interpretations, so as to not end up merely with a verbal disagreement.

[25]All Barnett quotations in this section are drawn from Barnett, "Contract Remedies and Inalienable Rights," pp. 186–88.

[26]Barnett cites Arthur Kuflik, "The Inalienability of Autonomy," *Philosophy and Public Affairs* 13, no. 4 (Fall 1984), p. 286, in support of his argument:

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One implication Barnett draws from these considerations is that:

> A no longer has the right to act on his own assessment of the rightfulness of a given command. In other words, A no longer has the moral means to respect the rights of C. If the transfer from A to B is valid, then A cannot be liable for the violation of C's rights. If liability exists, it must be limited to B.

This does not appear to be an insuperable problem for my side of this debate. If A is no longer a moral agent, then *of course* B must be responsible. He is the only one in this little scenario who *could* be responsible for A's unwarranted attack on C.

Further, I can use the same "logic" employed by Barnett against forfeiture. Suppose a jailor, to whom A's rights have been forfeited (not alienated), orders the selfsame A to violate the rights of the selfsame C of Barnett's illustration. Under these conditions, there is the same[27] "contradiction" in forfeiture that Barnett sees in alienation. For the sake of logical consistency, Barnett can either maintain his rejection of alienation and thereby also reject forfeiture, or maintain his defense of forfeiture and thereby embrace alienation.

There is a second implication which Barnett draws from his story about owner B ordering slave A to violate innocent third party C's rights: "There is now a conflict of rights. A would be acting wrongfully if he respected C's rights (thereby violating B's rights) and would also be acting wrongfully if he failed to respect C's rights."

There are problems here. First of all, any contradiction in rights due to inalienability applies as well to forfeiture, for prison wardens

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If the slave contract "is valid, then the autonomy-abdicating agent has no right to object, let alone to refuse" to violate the rights of innocent person C.

[27]Well, not exactly the same, but similar in all relevant regards. The only difference is that in the alienation case, A agreed to be bound by the commands of slave owner B, while in the forfeiture case, he is forced into obeying warden B. But in *both* cases, there is this seeming "contradiction" between doing what is right with regard to C (respecting his rights) and obeying the commands of B, whether in his capacity as slave owner or jailor. Yes, Barnett can argue that it is a contract violation for A to refuse to be bound by slave owner B's commands regarding C, but I can and do argue that so is it a (rights, in this case) violation for A to refuse to do as he is ordered to do by jailor B. Were Barnett to take the position that the commands of the jailor regarding innocent man C are illicit, the same stance is open to me with regard to the slave owner.

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as well as slave owners can order those under their control to do illicit acts.

Second, this objection does not get around the possibility that we can have a voluntary slave sale where the contract stipulates that the slave owner *can't* order the slave to violate rights. Barnett's charge of conflict between rights holds true only if the original agreement stipulated what it had no right to stipulate, what I need not advocate that it stipulate, namely, that the slave gives up his moral autonomy. On the contrary, I need only advocate the legality of a limited slave contract in which the slave gives up no more and no less than his right to object to being kidnapped, and agrees to be ordered to do all non-rights-violative acts asked of him by his new owner.

In the third place, and most basically, there is no rights conflict because B simply had no right to order A to violate C's rights. Therefore, it is no violation of B's rights to refuse to obey this illicit order.

In making his charge, Barnett correctly relies on the doctrine of "compossibility," which means that there can be no conflict in valid rights. He offers two possible reconciliations of the conflict which ensues when slave owner B orders slave A to assault innocent man C:

> First, we could conclude that because the original arrangement is binding, either C really had no enforcement right against A in the first place, or C lost his right upon the making of the contract between A and B. Second, we could conclude that the original agreement between A and B cannot be binding—that is, some of A's rights are inalienable—because such a rights transfer would conflict with the valid rights of C. Any rights theory that supported the rights claim of C (as most rights theories would) would have to deny the validity of the contract between A and B.

I don't much like his second alternative. To accept this would be to agree to his stance on voluntary slavery (that it is impossible), and to renounce my own (that it is possible, and even beneficial). What of his first? While I do believe that the initial contract *can* be binding, I do not agree with Barnett that it can be binding in the sense he implies. Namely, that the slave is duty-bound to obey whatever orders issue forth from the master. The problem I find with his two alternatives is that he ignores a third: that the contract is binding, but only in the *limited* sense that the slave is duty-bound to comply with all *proper* wishes of the master.

But Barnett is having none of this. He states:

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> A need not violate C's rights because neither A nor B have the right to violate the rights of another. This is true, but to recast the example in this way is to omit the issue unavoidably raised by the hypothetical agreement: Is A's right to control his own person and respect C's rights—a right that A indisputably starts with—a right that can be transferred?

The problem here is that we are now arguing at cross purposes. I agree with Barnett that if the only voluntary slave contract logically possible is the one *he* mentions, then voluntary slavery is a chimera, and there is at least one inalienability—the one he specifies. However, I maintain that a Barnett-type voluntary slave contract is *not* the only one possible. In addition to his, there is also a voluntary slave contract which limits the master to licit orders. If we allow him illicit ones, then, yes, difficulties ensue,[28] as Barnett has so eloquently shown.

Could Barnett argue, then, that I am conceding that there exists at least one thing that A cannot be allowed to sell, namely, the "right to control his own person"? No, because to be *allowed* to do something implies that you are *able* to do so. As Barnett himself states, "ought implies can." So it is *not* true that I am conceding that A not be *allowed* to give up his will. My claim is that this would be akin to a contradiction in terms, an attempt, as it were, to sell the proverbial square circle. A *cannot* do any such thing, because to do so is, in effect, to "commit" a logical contradiction.

According to Barnett:

> Notwithstanding any agreement he may have made to B, A is still under a duty to respect C's rights. A cannot, therefore, alienate such complete control of his future actions to anyone.

Yes, I agree, A cannot do that. But he *need* not do this, and *still* he can sign a voluntary slave contract. The only requirement (at least as far as this particular objection is concerned) is that the agreement stipulate that the master can never order the slave to violate the rights of third

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[28]Suppose that owner B orders slave A to create a square circle. Again, we have a contradiction, for the slave, in Barnett's conception, is morally and legally bound to obey his owner's orders but, in this case, he cannot. This is not an argument about voluntary slavery, at least after we see how it deteriorates. Rather, it is but an implication of the old computer adage "garbage in, garbage out." If you construct an argument with a contradiction in the premises, and argue validly, as Barnett has done, you will end up with a contradiction in the conclusion.

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parties such as C. If the master does this, it is then *he* who is in violation of the contract. This, of course, is not a critique of Barnett per se, since he quite properly maintains that "any agreement to obey the *lawful* (or rights respecting) orders of another would survive the analysis thus far presented."

My point, however, is that the master *cannot* legitimately give any other kind of order to his slave because he couldn't possibly have purchased the "right" to violate the rights of a third party from the person soon to be his slave. Future slave A initially had no right to invade C, so when A sold himself to B, A couldn't have the "right" to aggress against C. Thus, when B gives his command in this regard, it is per se an improper one, equivalent to an "order" to create the square circle.

Perhaps John Locke can be of help in this context:

> For nobody can transfer to another more power than he has in himself; and nobody has an absolute arbitrary power . . . to take away the life or property of another . . . and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power.[29]

Locke is totally correct in asserting the basic premise that "nobody can transfer to another more power than he has in himself." How could anyone do this? If I don't have the right to this here car, then I cannot legitimately transfer it to you. Person A, who is selling his autonomy, has no initial right to kill innocent person C. Therefore, when A sells himself to B as a voluntary slave, it would *not* be legitimate for B to order A to kill C. Based on Locke's insight, A didn't have the right to kill C in the first place. How, then, could he have passed on this right to B? The answer is that A could not do any such thing.

Therefore, Barnett's claim that voluntary slavery implies a logical contradiction (A cannot kill C under orders from B, since C has a right to his own life; A must kill C under orders from B, since B ordered him to do it, and A owes B allegiance as the slave of B, due to the contract he signed) is false. We must reject the second part of this supposed contradiction. Namely, it is not true that A must kill C under orders from B merely because B ordered him to do it and because A

[29]John Locke, *Second Treatise*, in *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), sec. 135.

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owes B allegiance as B's slave due to the contract they signed. Why not? Because, as Locke so ably informs us, A had no right to kill C before the slave contract, so he could not pass on this right through sale to B in that contract.

To recapitulate my reaction to Barnett's case where B orders A to violate C's rights:

1. A doesn't have to do it. He still owns his will. If A does commit aggression against C, A should be punished for it.[30]

2. Slave A who is told by his master B to assault innocent man C is in exactly the same position as he would be if instead of his master B giving him this command, it were strange gunman B_2 doing so. Since there is no contradiction in that case, there is none in this.[31] In both instances, an illicit order is given and the recipient is placed in an awkward position. To save his life, he must violate the libertarian legal code.[32]

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[30]If this was done under duress, then A can turn around and sue B for forcing him, A, to violate C's rights. But A is responsible for his act in the first instance. If B flees the scene and cannot be captured, then A owes a debt to C and must pay it himself.

[31]Do we go too fast? No. The gunman's victim owes him nothing; the slave owes the slave master certain duties of obedience, but not the duty to obey *illicit* orders.

[32]Suppose an ordinary non-slave situation. If A refuses to assault C, and is murdered by B, then the legal analysis is clear: B killed A unjustifiably. But suppose that A, fearing for his own life, assaults C, and then is captured. Then, the legal analysis is more complex. C has a case against A, his attacker. On the libertarian theory of punishment, C may collect damages from A. However, A has a case against B, and may, if B, too, can be caught, collect from B and turn this consideration over to C. However, if B cannot be brought to justice, then A must make good his attack on C, even though, in a sense, he was "blameless" or acted under duress. We know this since, at least under libertarian law, C may take violent measures to defend himself against A, even though A was not attacking him on A's own volition. This being the case, A is also responsible, after the fact, for damage imposed on C.

Further, B not only aggressed against C but also against A, so A can collect an additional amount from B for his own rights violation—assuming B has enough to first compensate C and then has something left over with which to compensate A. As well, C could sue B directly. I owe this point to Stephan Kinsella.

But the main point, the one of relevance to our text discussion, is that the *same* analysis applies to A whether he has assaulted C because he is B's

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3. A would *not* be acting wrongfully if he respected C's rights and refused to abide by B's orders. A would not be violating B's rights since B *has* no right to order A to assault C in the first place.[33]

4. The slave cannot sell that which he didn't own in the first place (the right to initiate violence against C).

Barnett's Second Reason[34]

Balked in his criticism of voluntary slavery (at least the version herein presented), Barnett moves on to the second of his four arguments. Here, in effect, he reiterates Rothbard's explanation that the "will" cannot be alienated.[35] This is unobjectionable when it comes to a "willful . . . act."

However, Barnett continues:

> Suppose, now, that the agreement between A and B were recast to read that A transfers to B "the right to use force against A to compel A to conform his conduct to B's commands."

As long as it were understood that B's commands were rights respecting, this is precisely the version of voluntary slave contracts that I claim should be permissible in law. However, Barnett objects on the ground that "a right to control a resource cannot in fact be transferred where the control of the resource itself cannot in fact be transferred."

In order to buttress his case, Barnett continues:

> The crucial question . . . is not whether A's consent to the use of force by B justifies B's actions, but whether A's prior consent can limit his right to withhold consent in the future.
>
> Suppose that, after promising to perform services and granting to B the "right" to use force to compel performance,

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slave, or because A is held at gunpoint by B_2. Voluntary slavery, then, presents no particular ethical problem. Barnett notwithstanding, there is no logical contradiction implied by such an institution.

[33]This holds unless C owes B the right to beat him up. That is, suppose C had previously battered B, and the court had determined that B now had the right to administer a beating to C. Under these conditions, it would be perfectly acceptable for B to order his slave, A, to batter C in his behalf.

[34]All Barnett quotations in this section are drawn from Barnett, "Contract Remedies and Inalienable Rights," pp. 188–90.

[35]See Rothbard, *Ethics of Liberty*.

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> A thinks better of it and revokes his consent. When B (or a court) attempts to enforce B's command, may A rightfully resist? The argument that B may rightfully use force against A entails that A no longer has a right to resist B because this right has somehow been transferred to B (or lost). Yet A's agreement notwithstanding, A retains his ability to resist B. Just as A cannot alienate his right to the future control of his person because his ability to control his person cannot literally be transferred, A cannot have transferred or lost his right to resist when he retains his ability to resist. Therefore, if A may rightfully resist B, then B may not have the right to use force against A, since such a right would also impose on A a contradictory duty to refrain from resisting.

There are several replies which must be made to this thesis. First, the agreement between A and B is a matter of contract, not promise. And contract, after all, is no small matter for libertarians, particularly in the absence of any conflict with the underlying private property rights regime.[36]

Second, A might still have the ability to resist B, but it may be greatly attenuated, e.g., by handcuffs or leg shackles, or by public opinion and the force of law, which still supports contractual rights and obligations.

Third, and more important, abilities and rights belong in different universes of discourse. We might go so far as to say, contrary to Barnett, that the one does not at all imply the other. For example, whether awake or asleep, I retain the identical *rights* not to be molested by you. However, in the former state, I surely have far more *ability* to resist you than in the latter. Therefore, if there were a one-to-one connection between rights and abilities of the sort posited by Barnett, my rights would radically change from daylight to nightfall.

Fourth, the reason that A could not alienate his will in our previous example had nothing to do with the fact that he could not eradicate his ability to control himself. As even Barnett admits, this conceivably could be done with "mind altering drugs, brainwashing techniques, or psychosurgery." On the contrary, A could not alienate his will because this would be part and parcel of a logical contradiction.

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[36]On this see Hans-Hermann Hoppe, with Guido Hülsmann and Walter Block, "Against Fiduciary Media," *Quarterly Journal of Austrian Economics* 1, no. 1 (1998), pp. 19–50.

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Fifth, the Barnett quote comes perilously close to asserting that "might makes right." But just because a person *can* resist does not at all give him the *right* to resist; just because he can*not* does not mean he has *no right* to do so.[37]

Barnett's Third Reason[38]

This brings us to Barnett's third reason for his anti-alienation thesis: "duties owed to oneself." While such an argument might, in a non-libertarian context, be deserving of the sort of long, sober, and serious analysis we have given his first two reasons, for the present audience, this must be given relatively short shrift. For a libertarian *qua* libertarian, there simply are no duties that one owes to oneself. The only duties owed by a libertarian, to anyone, are to refrain from initiating violence against non-aggressors, but these are duties owed to *other* people, not to oneself. Barnett, then, in espousing his "third reason," clearly leaves behind the realm of libertarianism. But he is not safe even there, for we shall pursue him wherever he goes.

What are the specifics? He writes:

> Suppose that it could be shown that one has a moral duty to live a good life or to pursue happiness. . . . [This would prevent] an agreement to transfer rights to all present and future acquired external possessions . . , [as well as] attempts to transfer a right to control *parts* of his body . . . such as his blood or heart.

Why? Presumably because this "would be an inferior moral choice" and would not be conducive to living a good life or pursuing happiness.

But libertarianism takes no view whatsoever on what is moral, what is a "good" life, and what contributes to such a state of affairs. It is concerned solely with the justified use of force.[39] And yet, Barnett's views on this matter are still subject to libertarian criticism.

First, harken back to our canonical example. Why is it immoral for a man to attempt to save the life of his sick child by selling himself

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[37]See Kinsella, "Inalienability and Punishment," p. 11, quoted below.

[38]Unless otherwise cited, all Barnett quotations in this section are drawn from Barnett, "Contract Remedies and Inalienable Rights," pp. 191–92.

[39]See, e.g., Walter Block, "Libertarianism vs. Libertinism," *Journal of Libertarian Studies* 11, no. 1 (1994), pp. 117–28.

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into slavery? As Barnett states, he will thereby lose "all present and future acquired external possessions," but by agreeing to engage in this sale of himself, he has *demonstrated* that he values his child's life more than any and all "external possessions" he may acquire in the future.[40] Given this, were he *not* to engage in a voluntary slave contract, or sell his blood, kidney, or heart for a price higher than he values these items, *then* he would be acting immorally, even in Barnett's terminology, and not pursuing what for him is happiness.[41]

But there is also a second problem. Barnett's moralizing directly contradicts libertarianism. Assume, now, that he is completely correct: voluntary slave sales are anti-happiness, and immoral to boot. They are akin, perhaps, to what Barnett would have to consider other victimless crimes, such as pornography, prostitution, gambling, drugs, alcohol, cigarettes, etc. The problem is that prohibiting slave sales, or any of these other acts that I stipulate to be immoral, is a violation of the libertarian non-aggression axiom. Say what you will about any of these activities, none of them involves the initiation of violence against any non-aggressor or his property.[42]

Next, Barnett cites the right to change one's mind as an escape clause for heart sales or voluntary slave contracts:

> While a person may be able to transfer control over a heart to another (and arguably may not be prevented from doing so), her never ending duty to herself prevents her from

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[40]Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," *Occasional Paper #3* (San Francisco: Center for Libertarian Studies, 1977).

[41]These things are rather subjective; what makes one person happy makes another miserable. Why should Barnett's view of the good life be allowed to determine the morality of others? See on this, e.g., James M. Buchanan and G.F. Thirlby, *L.S.E. Essays on Cost* (New York: New York University Press, 1981); Ludwig von Mises, *Human Action* (Chicago: Regnery, 1966); and Murray N. Rothbard, "The Hermeneutical Invasion of Philosophy and Economics," *Review of Austrian Economics* 3 (1989), pp. 45–59.

Even Barnett seems to concede this when he allows that a gift of a heart from one person "might be in conflict with the duty that person owes to herself (of course, it also might not)." But if Barnett himself cannot definitively make such a determination, how can he so positively assert this? After all, this is the very core of his third reason.

[42]See Walter Block, *Defending the Undefendable* (New York: Laissez-Faire Books, 1991).

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> transferring a right to her heart to another such that she must convey control of the heart even if she changes her mind.

This position is not without its difficulties. First, what are these duties that one owes oneself? These are, as we have seen, not only unspecified, but even the author of this claim questions them. Second, why do people have rights to change their minds about contracts duly agreed to only in the case of voluntary slavery and heart transplants? Or does Barnett favor undoing *all* contracts, if one of the parties changes her mind? Or, if not all contracts, perhaps only those dealing with door-to-door salesmen or encyclopedia hucksters? What if the contract specifies, before hand, that it is for *real*, e.g., one which, upon signing, *cannot* be set aside by a unilateral alteration of the feelings of one of the signatories?[43] Suppose, further, that the heart seller has already spent the money paid for the heart, and has no other worthwhile collateral. Would she still be allowed to change her mind about forking over the heart? It would appear that she would, for, if not, she wouldn't be able to "live a good life or to pursue happiness," at least according to some interpretations of these goals. Given these considerations, Barnett, it would appear, would have to favor outright theft. This is "moral"?

Another difficulty is Barnett's claim that "an airline pilot may be forcibly restrained by passengers from parachuting out in mid flight."[44] How can this be? Does not the pilot have duties to himself, just as does the heart donor? If the pilot's duties to himself do not allow him to quit in mid-air, why are matters any different in the case of the heart donor? Both have signed contracts, or otherwise obligated themselves to carry through with their agreed-upon tasks.[45]

To add insult to injury, Barnett asserts: "Surely the account just provided is not paternalist." One may be excused for thinking: Surely it is.[46] He defends against this charge on the ground that "such a universal argument for inalienable rights denies everyone the same option and therefore does not put advocates into any type of parental stance towards others." Suppose I were to command that no one eat potato chips since they are bad for health. Surely this demand on my

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[43]Isn't that supposed to be what a contract is all about in the first place?

[44]Barnett, *Structure of Liberty*, pp. 81–82.

[45]This point was brought into focus for me by Stephan Kinsella.

[46]Well, perhaps, instead, it is maternalist, given his mode of expression.

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part is paternalistic. I give this order for everyone's own good, including my own. *No one* can eat potato chips. There can be no doubt that this, too, is *universal*. Just because an order is non-hypocritical (e.g., it applies to the person making the order as well as to others) does not save it from being paternalistic.

States Radin:

> Two theories about freedom are central to the ideological framework in which we view inalienability: the notion that freedom means negative liberty, and the notion that (negative) liberty is identical with, or necessarily connected to, free alienability of everything in markets. The conception of freedom as negative liberty gives rise to the view that all inalienabilities are paternalistic limitations of freedom.[47]

Nor need we accept at face value the claim that Barnett's prescription is truly universal. On the contrary, it applies only to those who wish to sell their hearts or their liberty. Barnett attempts to liken his mandate with the libertarian axiom of non-aggression: "Any compossible system of rights restricts somebody's options—one may not act so as to violate the rights of another." But this will not do. The non-aggression axiom applies to all, without exception, not merely those who wish to engage in voluntary slave contracts.

The refutation to Barnett's views on paternalism is supplied by Nozick:

> A person may choose to do to himself, I shall suppose, the things that would impinge across his boundaries when done without his consent by another. . . . Also, he may give another permission to do these things to him (including things impossible for him to do to himself). Voluntary consent opens the border for crossings. Locke, of course, would hold that there are things that others may not do to you by your permission, namely, those things you have no right to do to yourself. Locke would hold that your giving your permission cannot make it morally permissible for another to kill you, because you have no right to commit suicide. My non-paternalistic position holds that someone may choose (or permit another) to do to himself

[47]Radin, "Market-Inalienability"; and Margaret Jane Radin, "Time, Possession, and Alienation," *Washington University Law Quarterly* 64 (1986). On negative liberty, Radin cites Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), For a refutation of his vision of negative liberty, see Rothbard, *Ethics of Liberty*, pp. 215–18.

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> *anything*, unless he has acquired an obligation to some third party not to do or allow it.[48]

Barnett's Fourth Reason[49]

Say what you will about Barnett's first three reasons, they were at least principled. The same, unfortunately, cannot be said for his last one. Here, Barnett's opposition to legalizing slave contracts is not because he claims they are rights violative, nor internally contradictory, but solely as a practical matter: to make law enforcement easier and/or cheaper. His argument

> stems from a general skepticism that agreement to transfer rights amounting to the control of one's destiny would ever (or very often) be obtained in the absence of incompetence, fraud, duress, mistake, or some other recognized contract defense. . . . For example, the high cost of erroneously deciding that a slavery contract was truly voluntary could be said to militate against *ever* permitting the enforcement of such an agreement.[50]

One problem is that Barnett is talking about saving money, and I am concerned with justice. At a deeper level, on this basis, we could ban seduction and consensual sex since it is sometimes difficult to distinguish them from rape. As Walter Williams writes:

> The test for moral relations among people is to ask whether the act was peaceable and voluntary or violent and involuntary. Put another way, was there seduction, or was there rape? Seduction (voluntary exchange) occurs when we offer our fellow man the following proposition: I will make you feel good if you make me feel good. An example of this occurs when I visit my grocer. In effect I offer, 'If you make me feel good by giving me that loaf of bread, I will make you feel good by giving you a dollar.' Whenever there is

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[48]Nozick, *Anarchy, State, and Utopia*, p. 58. For a defense of paternalism, see John Kleinig, *Paternalism* (Totowa, N.J.: Rowman and Allanheld, 1984).

[49]Unless otherwise cited, all Barnett quotations in this section are drawn from Barnett, "Contract Remedies and Inalienable Rights," pp. 193–95.

[50]As sources for this prophylactic argument, Barnett cites Anthony Kronman, "Paternalism and the Law of Contracts," *Yale Law Journal* 92 (1983), p. 768; Terrance McConnell, "The Inalienable Right of Conscience: A Madisonian Argument," *Social Theory & Practice* 22, no. 3 (Fall 1996); and McConnell, "The Nature and Basis of Inalienable Rights," pp. 53–54. Also see Radin, "Market-Inalienability"; and Radin, "Time, Possession, and Alienation," p. 1910.

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> seduction, we have a positive-sum game; i.e., both parties are better off in their own estimation.
>
> Rape (involuntary exchange), on the other hand, happens when we offer our fellow man the following proposition: "If you do not make me feel good, I am going to make you feel bad." An example of this would be where I walked into my grocer's store with a gun and offered, "If you do not make me feel good by giving me that loaf of bread, I am going to make you feel bad by shooting you." Whenever there is rape, we have a zero-sum game, i.e., in order for one person to be better off, it necessarily requires that another be made worse off.[51]

Likewise, on this basis, we could support preventive detention for all black teenage males, including totally innocent ones, on the ground that they can only be differentiated from the guilty ones at a "high cost." On this basis, we might even ban all marriages, since, with a divorce rate of some 50 percent, it is very hard to determine at the outset which of them will succeed.

Barnett concludes from all this that "resources external to one's person are (generally) alienable, and the right to possess, use, and control one's person is inalienable."[52] This, of course, runs directly counter to the truism that if you can't sell it (or give it away), then you really don't own it. Barnett affirms that you *do* rightfully control your own person, *and* that you should be prohibited from selling it, or, more strictly speaking, that any attempted sale of your own person should not be recognized by the law. My response: If you can't sell or give it away, then, and to that extent, you don't really own it completely, since full ownership brings in its wake the right to dispose of it however you wish to do so.

GEORGE SMITH

George Smith argues that if life and liberty are truly inalienable, not only are they not for sale, they cannot be forfeited either. As we have seen, forfeit is but an aspect of alienability. Therefore, he concludes, the death penalty is unjustified. Smith writes:

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[51]Walter E. Williams, "The Legitimate Role of Government in a Free Society," in *The Frank M. Engle Lectures, 1978–1997*, ed. Roger C. Bird (Bryn Mawr, Penn.: American College, 1998), p. 640.

[52]This is approvingly cited in Radin, "Market-Inalienability," p. 1896.

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> Inalienable rights are inextricably linked to our reason and volition, which together constitute our moral agency. Since we literally cannot alienate our moral agency—no one else can think for us, or will for us, even if we want them to—this means that we cannot alienate the right to exercise moral agency. We have no choice in the matter.[53]

But the *coup d'etat* to this line of reasoning has been given by Kinsella. This is so important an insight that I repeat it:

> If the "impossibility" of literally alienating one's will means that it is impossible to be bound by contract to act as someone's slave, why is it not "impossible" to imprison an aggressor to enforce restitution? After all, even a convicted aggressor still has a will. Why is it not "impossible" to defend oneself with force? And yet it is *not* impossible for consent to be irrevocably granted, as we have seen; this condition exists for a justly imprisoned aggressor. Recipients of defensive, restitutive, or retaliatory force all retain a will, which is overwhelmed with some type of responsive force.[54]

Undaunted, however, Smith continues:

> One of the consequences . . . of the philosophy of inalienable rights . . . I believe, is the total repudiation of capital punishment as inconsistent with the inalienable right of self sovereignty. . . . Every person—including a wanton, brutal killer—has certain inalienable rights in common with the rest of humankind, rights that cannot be transferred, abandoned, or forfeited. . . . The death penalty is a clear violation of that inalienable right known as self sovereignty.[55]

However much we may admire Smith's courage and sheer effrontery in attempting to overturn established principles, this simply will not do. If the murderer cannot forfeit his right to life since it is inalienable, then not only are we proscribed from imposing the death penalty upon him, we are not even warranted in using *self-defense* against him while he is in the act of killing us since, for us to do so would necessarily violate his inalienable right to life. How could we respect this right of his while killing him, even in self-defense? We

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[53]Smith, "A Killer's Right to Life," p. 46.

[54]Kinsella, "Inalienability and Punishment," p. 90.

[55]Smith, "A Killer's Right to Life," p. 47.

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could not, for this would be to forfeit the murderer's right to life, and, if there is anything that Smith has been clear about, it is that, for him, "'inalienable' mean[s] 'inalienable'."[56]

If there were any question about this, Smith goes on to maintain the purity of his vision:

> If we say that inalienable rights should be respected, but only under certain conditions, then . . . this . . . requires that we demote inalienable rights to a subordinate position.[57]

He might as well have deduced that incarceration, too, is improper, because it takes away part of a person's life, and all of his liberty. But Kinsella's dismissal of this notion is definitive: "If one is opposed to punishment on inalienability grounds, how can one then endorse defensive or restitutive force?"[58]

In Smith's 1996 article, "A Killer's Right to Life," he did not go that far, for that would have constituted a *reductio* of his own system. However, his 1997 article, "Inalienable Rights?" does just that:

> My case against capital punishment, if consistently applied, would militate against all forms of punishment, *such as fines and imprisonment.* I freely concede that this is a major problem for the libertarian theory of restitution. . . . Can we imprison someone and compel him to work off his debt? . . . These and other questions have not been adequately examined, much less answered, by libertarians, and I remain uncertain about how to deal with them.[59]

In response, Kinsella wrote, "Smith's view of inalienability of rights has clearly led him down a dead end. If he is consistent, he must condemn all uses of force, even defensive and restitutive."[60]

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[56]Nor can we imprison him, for this would be, in effect, kidnapping or enslaving him, certainly something incompatible with his inalienable right to freedom. Smith doesn't seem to realize this, as he buys into the notion of "a legitimate act of self defense." He states, "Murphy had declared a 'state of war' against me and others, so all of us had the right to use defensive violence against him." But what about Murphy's inalienable right to life? What about there being "no exceptions" to this rule, for any reason? See Smith, "A Killer's Right to Life," p. 68.

[57]Smith, "A Killer's Right to Life," p. 48.

[58]Kinsella, "Inalienability and Punishment," p. 83.

[59]Smith, "Inalienable Rights?" p. 55.

[60]Kinsella, "Inalienability and Punishment," p. 83.

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But there are difficulties with his position even short of that termination point. For not only does the murderer have a right to life and liberty (if they are truly inalienable), but the victim, too, has a property right in life. Thus, at least according to libertarian punishment theory, which is based on restitution, the murderer owes the victim a life.[61] There is, thus, a contradiction in the inalienability of life theory. The murderer must give up his life to the dead victim, but, according to inalienability theory, we cannot forcibly take the murderer's life in order to accomplish that task. Yet, the victim is also a human being; his life ought to be equally inalienable, at least according to this theory.[62]

If there are serious problems with Smith's analysis, he at least serves as a *reductio ad absurdum* against the inalienabilist position of Rothbard, Kinsella, and Barnett, for these latter authors certainly believe in self-defense and punishment, to say nothing of the death penalty itself. Yet, it is difficult to see how they can square this with their advocacy of inalienability. For, as we have seen from Smith, "inalienability is inalienability." There are *no* exceptions to this, such as for punishment or self-defense (whether or not Smith appreciates this point himself). Again, any such exceptions would require that the killer's freedom be *alienated* from him, in direct opposition to the perspectives of not only Smith, but Rothbard, Kinsella, and Barnett as well.

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[61]On this, and on libertarian punishment theory in general, see, e.g., N. Stephan Kinsella, "Punishment and Proportionality: The Estoppel Approach," *Journal of Libertarian Studies* 12, no. 1 (Spring 1996); N. Stephan Kinsella, "A Libertarian Theory of Punishment and Rights," *Loyola of Los Angeles Law Review* 30 (1997); Randy E. Barnett and John Hagel, eds., *Assessing the Criminal* (Cambridge Mass.: Ballinger, 1977); Roger Pilon, "Criminal Remedies: Restitution, Retribution, or Both?" *Ethics* 88, no. 4 (July 1978); and Randy E. Barnett, "Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction," *Boston University Law Review* 76 (February/April 1996).

[62]Smith, "A Killer's Right to Life," curiously, gives more respect to the rights of murderers than to the rights of victims. Assume we have a machine—in 10,000 years, we probably will—which can transfer the life from a live murderer back to his dead victim. Since Smith's position on inalienability prohibits the death penalty for the murderer, the murderer may not be forced to give up his life in behalf of the dead victim. There is only one life available for the two of them, murderer and victim, and Smith's position would not allow this life to be taken from the murderer and given to the victim. I owe this point to Stephan Kinsella.

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N. STEPHAN KINSELLA

Kinsella, as we have seen, constitutes a definitive rejection of Smith. As a critique of voluntary slavery, however, it is less successful. Kinsella starts off, reasonably enough, with libertarian premises:

> The key here is to focus on force and consent. . . . [T]o enslave someone, the slave owner must be *entitled* to use force against the slave if the slave disobeys or tries to run away. . . . It is the legitimacy of using force that matters, and this depends on consent.[63]

I agree wholeheartedly with Kinsella that the crux of the voluntary slave controversy, at least for the libertarian, revolves around a key question: When the slave disobeys and/or tries to run away, and the would-be owner uses violence in order to quell this disobedience, is the slave master guilty of a violation of the libertarian proscription against the initiation of force? If he is guilty, then there can be no such thing as a voluntary slave contract; if not, there can be.

What is Kinsella's proof that the owner is indeed guilty of a violation of the libertarian non-aggression axiom in such a case? He states:

> If A promises (or contracts, or agrees; the terminology is not important) to be B's slave, this is no doubt an attempt to consent *now* to force inflicted in the future. If A later changes his mind and tries to run away, may B at that point use force against A?
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> . . . . I would say no, however, simply because there is no reason why A *cannot* withdraw his consent. Unlike the case of aggression, where the aggressor's prior aggression estops him from objecting to the use of retaliatory force, *A has not committed aggression* against B. Thus, it is not inconsistent for A to later object to the use of force. All A did previously was utter words to B such as "I agree to be your slave." But this does not aggress against B at all, any more than does uttering the insult, "You are ugly." . . . In a nutshell, a would-be slave-owner must be entitled to use force against the would-be slave in order for the slavery agreement to be enforceable and for rights to be alienated in this manner; but the would-be slave has simply not initiated force against the would-be slave owner.[64]

There are several flaws here. But before discussing them, I must acknowledge a valid point. It is not a matter of great importance if we

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[63]Kinsella, "Inalienability and Punishment," p. 90, emphasis in original.

[64]Kinsella, "Inalienability and Punishment," pp. 90–91, emphasis in original.

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are talking about contracts, where consideration is given, or about gifts or agreements, where it is not.[65] A violation of the former clearly can amount to theft, which is strictly proscribed by libertarianism; but a violation of the latter is also stealing.

If there is a voluntary slave *contract*, then consideration has been exchanged. For example, B paid A, say, $1 million which A no longer has (since he spent it on his child's medical operation, given the example with which we began this paper). One week later, A becomes tired of slavery and decides to leave. If he does, though, he is departing with an entity, A himself, for which B paid this rather considerable sum of money.[66] Under these circumstances, I fail to see how it can be maintained that "*A has not committed aggression* against B." A most certainly *has* committed aggression against B once A runs away, by stealing B's valuable slave, namely, A himself. If horse rustling is a crime, and it is and should be, then so is slave stealing.

But if voluntary slavery consists of no more than an agreement or gift on the part of A to B, and A later reneges, B is still justified in using force against A to compel him to keep his promise. Absent this position, any gift-giver or donor would always be in a position to come to the gift-receiver or donee and demand the return of his largesse.

Now for the disagreements with Kinsella. I cannot see my way clear to agreeing that it doesn't matter if the slavery stems from a contract, agreement, or promise. In my view, only the latter cannot support the use of force on the part of the slave master to keep his property under his continued dominion. Kinsella writes: "Rights are inalienable in the limited (and more conventional) sense that one cannot irrevocably grant consent to aggression in the future by way of a mere promise."[67] Again, I agree. Where I depart from Kinsella is that I maintain that promises on the one hand, and agreements and

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[65]In a previous draft of this paper, I took the opposite position, but Stephan Kinsella subsequently argued me out of it. I thank him for setting me straight on this issue. On this issue, see N. Stephan Kinsella, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," *Journal of Libertarian Studies* 17, no. 2 (Spring 2003).

[66]A contract supported by consideration is sufficient to transfer title, but it is not necessary. Title can also be legitimately transferred in a unilateral or gratuitous transfer without any consideration passing hands. I owe this point to Stephan Kinsella.

[67]Kinsella, "Inalienability and Punishment," p. 91.

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contracts on the other, are very different entities. By contrast, he takes the position that "the terminology is not important."

As for promises, I support Rothbard, who states:

> Suppose that A promises to marry B; B proceeds to make wedding plans, incurring costs of preparing for the wedding. At the last minute, A changes his or her mind, thereby violating this alleged "contract." What should be the role of a legal enforcing agency in the libertarian society? Logically, the strict believer in the "promise" theory of contracts would have to reason as follows: A voluntarily promised B that he or she would marry the other, this set up the expectation of marriage in the other's mind; *therefore* this contract must be enforced. A must be *forced* to marry B. As far as we know, no one has pushed the promise theory this far. . . . [T]here can be no property in someone's promises or expectations; these are only subjective states of mind, which do not involve transfer of title, and therefore do not involve implicit theft.[68]

In the contract case (albeit not where there was only a promise), runaway slave A took B's $1 million in what became bad faith when he ran away; in effect, A stole this money. (In actual point of fact, what was stolen, literally, was the body of the slave, by himself.)[69] Surely a man has a right to use force against a thief who steals $1 million from him; why not then in this case? If so, then freedom is alienable. In the agreement case, the runaway slave did not steal any specific amount of money; rather, he absconded with a valuable asset of the slave owner, himself.

Another difficulty with Kinsella's case for inalienability is that he makes exceptions to it. He supports Barnett's claim that "an airline pilot may be forcibly restrained by passengers from parachuting out in mid-flight." He also would allow force to be used against the person "agreeing to donate an organ which causes the recipient to rely on this, or enlisting in a volunteer army at a time of peril."[70]

But if there are exceptions to inalienability, then this doctrine cannot be true as a matter of principle. What happened to the supposed inalienability of the will of the pilot, donor, and soldier? Why

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[68]Rothbard, *Ethics of Liberty*, p. 134.

[69]I owe this point to Stephan Kinsella.

[70]Kinsella, "Inalienability and Punishment," p. 91, n. 37, citing Barnett, *Structure of Liberty*, pp. 81–82.

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are their "rights" being denied? What happened to Kinsella's argument, in effect, that the airline pilot, the organ donor, and the voluntary enlistee "have not committed aggression against" their respective B: the passengers, the organ donee, and the citizenry? As we have seen, if these agreements were a matter of contract, then there *was* aggression, and the wages of the pilot and soldier, and, in effect, the fee of the donor were stolen.

Of course, this leaves open the question of whether the contract should be upheld, e.g., specific performance required, or if the contract violator should merely be forced to return the money he was paid, perhaps with a additional amount as a penalty. In my view, in a fully free market system, there would be two kinds of contracts: those that specify specific performance, and those that allow financial penalties and monetary recompense. In the absence of any such distinction, I would enforce specific performance with the understanding that the contractually obligated person could buy his way out of the contract at a mutually agreeable price. For example, an opera singer with laryngitis would be dragged onto the stage, kicking and screaming (well, whispering) if need be. One such publicized incident of that sort and people would no longer be so willing to sign contracts without escape clauses.

Even I would not go so far as Kinsella on these exceptions. To me, it matters not one whit whether the donee "relies" on the donor's promise, or the citizens on the soldier's. The key element is contractual, not promissory. If the pilot, donor, and soldier were paid, then their failures to honor their contractual obligations amount to no less than theft, and certainly justify the use of force, at least under libertarianism. Contracts are a serious business, and should be treated as such.[71]

Going out on a limb for inalienability, Kinsella feels duty bound, reasonably enough, to preclude such a fate from contracts involving non-human resources. If *all* things were inalienable, if nothing were capable of being sold or given away, we would not have much of a free market place. His line of defense against any such conclusion is that there is a world of difference between our rights to ourselves (our own persons) and our rights over physical property such as land, clothing, etc. For him, the former supercede the latter. Kinsella writes:

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[71]On the other hand, contracts are based on property rights, and cannot violate them. For more on this, see Hoppe, et al., "Against Fiduciary Media."

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> The right to alienate external resources is not limited, however, because of crucial differences between rights pertaining to one's person and rights of ownership in homesteaded goods. The right to homestead external resources is derivative of and distinct from the basic right against non-aggression. External scarce resources are appropriated and acquired, and held by intention (it is this that distinguishes ownership from possession), and thus can be abandoned or alienated by a sufficient expression of intention, i.e., a contract. For this reason, under the libertarian title-transfer theory of contract, one can alienate particular property titles, i.e., titles to external (homesteadable) scarce resources owned by an individual. In this sense, there is a distinction between title to property, which is alienable by mere contract, and rights related to one's body, which are not alienable by promise or contract.[72]

I am unpersuaded by this line of reasoning. I know of no sharp distinction between property internal or external to the person in libertarian theory. On the contrary, I maintain, it is all of a piece. Liberty is a seamless web, applying, equally, to human and non-human property. External property, of course, can be abandoned, but so can the internal version, by suicide or zombicide.

In order to see this, let us consider what is perhaps the most rigorous defense of basic liberties ever penned: Hoppe's argument from argument.[73] In the view of this philosopher, the only way to establish truth in political philosophy is through argumentation; if a theory cannot survive this process, it cannot be counted as true. What, then, are the preconditions for argumentation to take place? Given present technical accomplishments, one must have a throat, a tongue, lungs, vocal chords, indeed a body. Score a point for Kinsella. But one *also* needs at least a place to stand on, if not also food, protection from the elements, etc. Hoppe's point is that if any specific argument denies any of these underpinnings which are themselves required for argument to occur in the first place, it is to that extent flawed. This would rule out *any* attack on freedom of the person *or* on property rights, since *both* are necessary for this process to take place.

So Kinsella cannot sustain his claim that personal rights are somehow more important than rights to physical property. *Each* is a necessary condition for the free society. Either of them avails nothing

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[72]Kinsella, "Inalienability and Punishment," p. 92.

[73]Hoppe, *A Theory of Socialism and Capitalism*, p. 131.

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without the other. Each is necessary; only together are they sufficient for this end.

In concluding this section, let us return to our canonical example of the poor father who wants to save his child from a death threatening illness which will cost $1 million, and the rich man who wants this father as his property, and will pay this amount of money. If the law on this matter were as Kinsella advocates, this business arrangement could not be consummated. The rich would-be slave owner is officially put on notice that if and whenever the slave-father decides to run away, any force used to prevent him from doing so would be illegal. Without being able to resort to compulsion, though, he would have no way to ensure continued ownership over the human slave he has purchased, so he won't pay the $1 million in the first place, and the sick child dies. The reason for this state of affairs is that self-ownership can be alienated not by contract but only through forfeit, by committing a crime. If someone wants to become a slave, the only way he can do it is to commit murder and be found guilty; then, at least under libertarian law, he will become the slave of the heir of the victim. If he wants to be paid for becoming a slave (e.g., in order to save his child), he is simply out of luck.

DAVID GORDON

Gordon approvingly comments on Rothbard's argument that contractual rights are very important, but are inferior to private property rights. Gordon interprets this as opposition to voluntary slave contracts:

> You cannot, then, sell yourself into slavery. You can voluntarily submit to the will of another; but, should you change your mind, no legal force can compel you to obey another's bidding. Why not? Contract, to reiterate, does not stand as an absolute: only what fits together with self ownership can be enforced. You can only give away your property, not yourself.[74]

Gordon buttresses this interpretation by again citing Rothbard, this time to the effect that neither promise nor expectation can serve as the springboard for contract; instead, it "must involve a transfer of titles between the parties at the time the contract is made."[75] As

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[74]Gordon, "Private Property's Philosopher," p. 2, citing Rothbard, *Ethics of Liberty*, p. 133.

[75]Gordon, "Private Property's Philosophy," p. 3.

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Rothbard correctly points out, only here—not in the case of contract as promise nor contract as fulfilled expectation—is a contract violation akin to theft. When a promise is broken or an expectation unfulfilled, there is no necessary illicit transfer of property, e.g., theft. However, if there is a title transfer, but one party to the contract does not fulfill his end of the bargain, then he has in effect stolen property from the other.[76]

Notice that there are three separate strains of intertwined thought underlying this argument. First, Gordon bases his rejection of voluntary slave contracts on them being per se incompatible with self-ownership. Second, he takes the position that selling oneself into slavery is putting the cart before the horse, to favor the least important of two basic libertarian building blocks (contract) and to deprecate the more important of them (property), given that they are in conflict. Third, to this end, he points to the failure of contract as promise or failed expectation, and the validity of contract as title transfer. Say what you will about these arguments, it cannot be denied that they are entirely separable. Thus, in defending voluntary slave contracts, we must counter each of Gordon's very different arguments, one at a time.

Let us begin with self-ownership (in so doing, we will ignore the issues of whether contract is incompatible with property rights, and what justifies contracts). Gordon maintains that to give or sell yourself (not merely your physical property) to someone else would be a per se violation of self-ownership. I claim, very much to the contrary, that to *forbid* this *and* to fail to legally enforce such contracts would violate the rights of self-ownership of the person. If you really own something, whether an unimportant piece of your property (such as a car or house) or an important part of your property (such as your own person), then you should be able to sell or give it away. The extent to which you cannot do with yourself what you will is the extent to which you do not really own yourself.

We consider the charge that the voluntary slave case implies an abnegation of property rights in favor of contracts (in this discussion, we avoid the issue of whether this doctrine is false per se, and again the justification of contracts themselves). I have no disagreement with Gordon insofar as his main contention is concerned. Property rights

[76]It is precisely this analysis which is the antidote to Kinsella's failure to distinguish between contract and promise.

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are, indeed, logically prior to contract. Be the latter ever-so-important for libertarian theory, they must of necessity rest on the bedrock of property rights, for in engaging in commercial arrangements, one can legitimately only do so with one's own property. To do so with that properly belonging to someone else is hardly compatible with the freedom philosophy.[77]

But why is it thought that the voluntary slave contract transfers property which is not owned, or illegitimately owned? The slave is transferring the right to control *himself*; and who, if not this person himself, has the right to do so? Surely, there can be no one else with this right. There is no third party C in a position to protest that the sale of A to B is a violation of C's rights.[78]

Now for the argument from contract (and again, we ignore the issues of self-ownership and of giving undue precedence to contract over property rights), once again I find myself in full agreement with both Gordon and Rothbard. They are both entirely correct in asserting the title transfer theory of contract, vis-à-vis those positions which explain contract in terms of promise or expectations fulfillment. But where is the evidence that voluntary slave contracts rely on promise or expectation? While, conceivably, *some* voluntary slave contracts may indeed be of this variety, this is hardly necessary. It is easy to

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[77]As it happens, Hoppe, et al., "Against Fiduciary Media," make this identical point with regard to fractional-reserve banking. The main point of that essay is that even on the assumption that the contract between the fractional-reserve banker and his customer is fully informed and voluntary, it is still invalid under libertarian law because the agreement between these two concerns property which belongs to neither of them.

Regarding the relationship between fractional-reserve banking and voluntary slavery, Hülsmann mistakenly draws the very opposite conclusion. In his view, the agreed-upon impropriety of the former is fully congruent with, and even implies, the impropriety of the latter. He states: "Someone claiming that the interdiction of fractional-reserve banking would infringe upon man's freedom of contract would have to hold the defense of slavery to be a like infringement." See Hülsmann, "A General Theory of Error Cycles," n. 41.

From my perspective, by contrast, I only cite the illicitness of fractional-reserve banking as evidence that I agree with Gordon that property rights undergird contractual rights, and the latter cannot be valid when they are incompatible with the former.

[78]By contrast, in the fractional-reserve banking case, there are innumerable third parties in exactly this position.

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conceive of other voluntary slave contracts which rely not at all on promise or expectations fulfillment, but rather on title transfer. In our canonical case, A sells himself to B in return for $1 million. If this is not a title transfer, then nothing is. Were A allowed to abrogate this contract (assume he has already spent the money for his child's operation), it seems difficult to deny that he would thereby be (in effect) stealing the money he was paid for his services as a slave. On what grounds is it claimed that this has anything whatever to do with promise or expectations? It seems clear that this is a veritable paradigm case of a title-transfer contract in action.

RICHARD EPSTEIN

From my perspective, Epstein starts off well enough for an article which argues for restraining alienation:

> As a first approximation, it appears that any restraint upon the power of an owner to alienate his own property should be regarded as impermissible. . . . To the person who thinks of rights as being acquired by first possession, the right of alienation seems to be an inescapable element of the original bundle of property rights. If alienation is not acquired by the person who has obtained ownership by taking possession of the property, then who else can claim it, and by what possible warrant?[79]

He continues on a similar wavelength:

> To insure that exchanges can go forward, rights of alienation must be vested somewhere, or resources will remain fixed in the hands of those who do not want them. There seems no better place in which to locate exclusive rights of alienation than with the parties already entitled to possession and use.[80]

But even here there are signs of weakness. For one thing, this perspective is altogether too pragmatic and utilitarian, as opposed to rights based. Institutions that prevent the free flow of resources to those who most value them will certainly reduce overall wealth.[81]

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[79]Richard Epstein, "Why Restrain Alienation," *Columbia Law Review* 85 (1985), p. 971.

[80]Epstein, "Why Restrain Alienation," p. 972.

[81]But this is a rather superficial and Coasean reason for preferring that they do, and is hardly the point here.

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For another, this statement allows for the possibility that the law *could* vest property in A's hands, and the right to alienate it in B's hands, and that it does not do so entirely as a matter of convenience. But matters are a bit more limited than that. One may go so far as to say that it is a necessary part and parcel of ownership that one can give away, sell, or otherwise alienate the property. Indeed, if one is forbidden to alienate it, then, and to that extent, one does not really own it at all. If a man is permitted by law to occupy some land, but not sell it, then he is merely a legal squatter, not the owner.[82]

It is, perhaps, possible for some—however, not for libertarians of the sort that Epstein claims to be—to suppose that all private landowners are, or can ever be, is squatters. Property rights to land, in this vision, could properly only belong to the crown, or to the state in more democratic eras.[83] But what of the individual person? It is more difficult to claim that people are really owned by the crown, in that they cannot sell themselves, and are mere squatters of themselves, so to speak. So we arrive again at the original issue, only this time for people, not land and other property: It is *not* the case that original ownership of the person *could* vest in himself *or* in someone else. It must necessarily be entrenched only in himself. This being the case, the right of alienation, then, *must* inhere in the individual.

So far, to be fair to Epstein, there are only hints that he rejects the total alienability that I have been defending. It is only when he discusses torts vs. injunctions for possibly dangerous activities that his views become pellucid. He states:

> This uncertain inquiry into remedial choices works itself back into the question of alienability. Suppose, for example, it is concluded that no effective remedy is available against the party in possession of the [dangerous] thing because he is insolvent or difficult to locate or both. Tort actions for damages or injunctions quickly become impossible or at least too costly. At this point, the protection of third parties need no longer be confined to remedies directed against the party in possession. Protection of third parties could demand that dangerous instrumentalities never get into the hands of those persons whose conduct cannot

[82]Of course, he can be a renter, or the holder of a usufruct, but this is a matter of contract, not law. I owe this point to Stephan Kinsella.

[83]For a critique of the Henry George school of economics, see Murray N. Rothbard, *Money, Method, and the Austrian School*, vol. 1 of *The Logic of Action* (Cheltenham, U.K.: Edward Elgar, 1997), pp. 284–85.

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> effectively be policed or monitored. Legal restrictions on alienation thus allow an indirect attack upon improper use of dangerous things.[84]

This is similar to Barnett's fourth reason for opposing alienation: It is sometimes cost effective to violate rights. However, just because a man "is insolvent or difficult to locate or both" does not mean his rights may be disregarded.

The first illustration of this principle offered by Epstein is gun control.[85] Distinguishing between machine guns, rifles, and pistols, he favors the present ban on the sale and use of the former. He is ambivalent about the latter two, since he thinks it an empirical issue, and it is not clear to him whether the benefits outweigh the costs.[86]

But gun control—of *any* type, variety, or kind, up to and including machine guns—is not justified on his own libertarian grounds. Epstein's words are surely worth repeating: "The core function of the law is to protect all persons and their property against the force and fraud of another."[87] But mere gun sale or ownership surely cannot count as "force against another." As even Epstein acknowledges, guns can be used for many other purposes, including target shooting, contemplation, antiquarianism, etc., but, preeminently, for self-defense.

In contrast, atom bombs are necessarily offensive. They cannot be targeted to include only the guilty. This implies, however, not only that thermonuclear devices should have their alienation restricted, but, even more basically, they should be entirely prohibited. No one should be able to sell an atom bomb, but no one should be able to own one either.[88]

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[84]Epstein, "Why Restrain Alienation," pp. 973–74.

[85]Epstein, "Why Restrain Alienation," p. 974. Epstein's analysis is similar to Guido Calabresi and Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85, no. 6 (April 1972). They place restrictions on the alienation of pollution, but do not advocate banning it entirely.

[86]Perhaps Epstein will change his mind if he reads John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (Chicago: University of Chicago Press, 1998). Lott had the same view, then went and did the research, only to discover that the costs of gun control are huge and the benefits are small.

[87]Epstein, "Why Restrain Alienation," p. 970.

[88]For an analysis of H-bombs in the off-world context, where they need not be offensive weapons, and therefore should not be banned (nor restrictions

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Epstein's second example is liquor, because "the behavior that alcohol induces in drinkers may inflict serious harm upon third persons."[89] This constitutes a reductio against his own position. Given what Epstein says about the "the core function of the law," and given that imbibing alcoholic beverages is not a per se violation of liberty, banning their sale clearly involves Epstein in a contradiction. Practically *anything* may "inflict serious harm upon third persons": soap, skates (you can slip on them and hit someone else), nails, knives, glass (they can cut third parties), salt, pepper, aspirin (too much can poison you; under socialized medicine, you will become a burden on others), and so forth. Were he consistent, Epstein would have to urge a ban on the sale or possession of all of these household items. The question Epstein must face concerns how to reconcile this with his own libertarian sentiments. His treatment of this topic suggests that he is calling for a reinstitution of alcohol prohibition.[90]

Epstein's third example concerns narcotics and drugs:

> There is always a danger, especially with narcotics, that persons under the influence will inflict harms on third parties, as when a gunman under the influence of heroin goes on a rampage.[91]

Yet, if there are any harms having to do with such substances, it has to do with their prohibition, not they, themselves. The outlawry increases prices dramatically from what they would be on a free market. This creates crime in several ways: Addicts have to commit crimes to pay for their habits; people using these drugs are criminalized by law; gangs shoot each other, and also innocent by-standers; and the police are suborned and co-opted thanks to the gigantic profits which flow from the prohibition in the first place. While this is neither the time nor the place to go into a full-scale critique of narcotics laws, suffice it to say that if Epstein were really concerned about "third party harms," he would take a tack opposite to that which he took.[92]

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placed on their alienation), see Walter Block and Matthew Block, "Toward a Universal Libertarian Theory of Gun (Weapon) Control: A Geographical Analysis," *Ethics, Place, and Environment* 3, no. 3 (2000).

[89]Epstein, "Why Restrain Alienation," p. 976.

[90]Surely this is a misreading on my part?

[91]Epstein, "Why Restrain Alienation," p. 977.

[92]Epstein's concern with "third parties" seems to have evaporated in regard to bystanders injured or killed under such circumstances. For a critique of

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Fourth, Epstein advocates a ban on the sale of "a book that describes how to build an atomic bomb."[93] This is similar to the drug that makes you go out and murder. The drug itself should be legal since its purchase and even ingestion are not per se acts of violence. People who buy it, though, should be carefully followed by the police.

But what about books written by Marx or his many followers? Based on Epstein's theory of causation, these volumes have killed far more people than those which tell us how to make an atom bomb. Books and articles by scholars masquerading as libertarians, or by feminists, multiculturalists, and their ilk have undoubtedly been far less harmful than Marxist ones, but they, too, have caused harm. Should they also be banned? Epstein might agree, but this would clearly be improper under the libertarian legal code.[94]

Conclusion

What, precisely, did the slave owner in Alabama in 1835 get from his slave? Moral agency? Will? Heartfelt and cheerful obedience? None of the above. The master only received the privilege that when and if he used violence against the slave, he would not be penalized by law for assault, battery, and kidnaping, as he would have been had he carried out these acts against a free person. *That is all* that voluntary slavery would give the owner; not moral agency or will or anything else discussed by the critics of voluntary slavery.[95]

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narcotics laws, see, e.g., Meaghan Cussen and Walter Block, "Drug Legalization: A Public Policy Analysis," *American Journal of Economics and Sociology* 59, no. 3 (July 2000).

[93]Epstein, "Why Restrain Alienation," p. 978.

[94]Epstein, "Why Restrain Alienation," pp. 978–84, also opposes alienation for "common pool problems," but he does so as part of contractual agreements, that is, if people agree to do so. On p. 982, he states: "both sides often agree that the rights that they have created under contract shall not be assignable without the consent of the other." Since I favor the right of owners to do exactly as they wish with their own private property (as long as it is not used to invade the rights of others), his thesis in this section of his paper does not contradict my own. However, for a critique of the common pool analysis employed by Epstein, see Walter Block, review of *Property and Freedom*, by Richard Pipes, *Quarterly Journal of Austrian Economics* 5, no. 1 (Spring 2002).

[95]A short summary of the problems with the claim that life and liberty are inalienable is that it entails the prohibition of:

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Let me close by reiterating the point that in criticizing the views on voluntary slavery of Rothbard and his associates, I am not attempting to, nor do I succeed in, denigrating Rothbard's basic libertarian philosophy. Rather, I see myself as making a tiny adjustment to this system, one which strengthens libertarianism by making it more internally consistent.

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1. suicide, euthanasia, and religious martyrdom;

2. any punishment at all, let alone the death penalty; see Smith, "Inalienable Rights";

3. placing one's life at risk, as do stunt men or race car drivers; see Barnett, "Contract Remedies and Inalienable Rights," p. 190;

4. defensive violence against attackers; see Kinsella, "Inalienability and Punishment";

5. boxers and masochists; see Barnett, "Contract Remedies and Inalienable Rights," p. 190; and Arthur Kuflik, "The Utilitarian Logic of Inalienable Rights," *Ethics* 97 (October 1986), n. 5;

6. marriage until death do us part; that is, marriage with no possibility of divorce; previously, this was the rule in many countries, and in Ireland until very recently; and

7. medical operations; see Kuflik, "The Utilitarian Logic of Inalienable Rights," n. 5.

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BOOK REVIEWS

Edited by N. Stephan Kinsella*

JOHN MERRIFIELD. *SCHOOL CHOICES: TRUE AND FALSE.* OAKLAND, CALIF.: INDEPENDENT INSTITUTE, 2002. PP. 97.

Thanks to the wholesale failure of the K–12 public school system, the mantra of "school choice" is getting louder, and "education reform" has become a common topic of politicians. By far, the most popular reform proposal is to give parents a choice about where to send their children to school. What this usually entails is an educational voucher that parents can redeem at a private school.

John Merrifield's book *School Choices: True and False* is a critique of current school choice programs and proposals that emphasize competition in education as the means of bringing about real reform in education.

Between a brief introduction and an even briefer conclusion, *School Choices* contains eight chapters that progress from the current state of the public school system to problems with current reform proposals to the author's policy requirements for a competitive education industry. The main focus of the book is on voucher proposals and programs, although other related topics are also addressed. Because Merrifield is an economist, principles such as supply and demand, competition, cartels, the price system, the profit motive, barriers to entry, incentives, efficiency, monopoly, regulation, and entrepreneurship are raised in the text as they relate to the subject at hand. An extensive reference list, explanatory notes, and a detailed index enhance the usefulness of this slender volume.

Merrifield begins in the introduction with a clear thesis: "Genuine competition is the only true reform catalyst" (p. 2). He focuses on both

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"the critical elements of a competitive education industry" (p. 2) and the failure of current voucher programs and proposals because "choice advocates have forsaken and endangered the only truly effective reform catalyst—competition" (p. 2). However, because Merrifield falls short of advocating the complete separation of school and state, he fails to present us with what real competition in education would actually be like.

Although Merrifield harshly criticizes Charter schools and tuition tax credits, his greatest attention and disdain are focused on voucher programs currently under way in Florida, Milwaukee, and Cleveland. However, this is not because they are voucher programs, but because they limit participation to low-income parents and low-performing schools (with the state grading its own schools), do not allow for add-ons (supplementing the tax-funded voucher to send a child to the higher-priced private schools), and are just plain too small to provide us with any meaningful results.

As these reform proposals relate to Merrifield's theme of competition, he concludes:

> The modest voucher, tax credit, and public-school choice programs (including charter schools) widely touted as experiments lack nearly all of the key requirement for competition. They move only a relatively few children, mostly among existing schools; leave the broken system intact and sanctify its key elements; and mislead observers as to the nature of the real K–12 problem—a low-performing system, not isolated low-performing schools. (p. 45)

Merrifield's solution to the school reform problem is not an end to the public school system, voucher programs, or the federal control of education; instead, he advocates government-funded, universal, child-based vouchers.

There are several problems with Merrifield's proposals. First of all, there would be no school choice for parents who wish to send their children to "non-traditional" private schools that do not take orders from the state regarding textbooks, teacher qualifications, integration, or curriculum requirements. Likewise, there would be no school choice for parents who wish to send their children to "non-traditional" religious schools that, by their very nature, are highly discriminatory in regard to hiring and admissions.

The second problem concerns government regulation of private schools that take vouchers. Naively, Merrifield states:

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> I am not convinced that a refundable tax credit or fully funded voucher risks any more regulation of the private sector than exists now or will exist in the near future. But even if the risk were greater than with other approaches, the potential benefits of system transformation are worth it! (p. 65)

Of course, it is unlikely that the state would provide money to parents or schools without strings attached.

The third problem, then, concerns the increased dependency on the government that vouchers will foster. The state may well embrace universal vouchers if it sees how it can use them to its advantage.

The fourth problem relates to the distortion of the marketplace that universal vouchers will cause. As an economist, Merrifield should realize that his universal voucher program will establish a price floor, and tuition will not go below it. No private school would have any incentive to compete on cost, and, as a consequence, prices will be higher for everyone. This would be true even if a fully refundable tax credit was used instead of a voucher.

The fifth, and most egregious, problem is the matter of funding. Merrifield's universal, child-based voucher is government funded. In fact, under his proposal, there would be government funding of education even if there were no public schools. So whether we have public schools or not, why should each citizen be forced to pay for the education of each other citizen's children? And to make matters worse, voucher funding comes from "fresh money." No current voucher proposal even hints at a reduction in funding for public schools to pay for vouchers.

Merrifield, who is clearly indebted to Milton Friedman, points out that "the modern voucher debate began with Milton Friedman's 1955 proposal that was first read widely in chapter six of his 1962 book *Capitalism and Freedom*" (p. 35). He even explicitly endorses Friedman's ideas in the last note in the book: "Libertarians should note that Friedman-type proposals are the best and probably the only political feasible way to achieve complete separation of school and state" (p. 90).

Besides endorsing Friedman's voucher proposals, the book also suffers from some glaring mistakes in the index. The entry for Friedman, for example, includes pages where his name is not mentioned and omits pages where his name is mentioned. The index includes

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page numbers for those subjects amplified or referred to in the notes, a commendable feature except when the page numbers are wrong. They are, in fact, so wrong in this book that every reference in the index to a page in the notes is incorrect.

School Choices: True and False should cause libertarians and conservatives who favor current voucher programs and proposals to rethink their position. Critics of vouchers will find in this slender volume much useful information and insightful analysis on the problems with current voucher programs in Florida, Milwaukee, and Cleveland. However, for those principled libertarians who reject, root and branch, government- (i.e., taxpayer-) funded education, the book will be a disappointment, since the author advocates government-funded, universal, child-based vouchers.

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